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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]101

THE COCA-COLA COMPANY, PETITIONER,

vs.

THE KOKE COMPANY OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 30, 1919.

CERTIORARI AND RETURN FILED JULY 21, 1919.

(27,093)

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OCTOBER TERM, 1919.

No. 362.

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THE KOKE COMPANY OF AMERICA.

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In the United States District Court for the District of Arizona.

Bill of Complaint.

The Coca-Cola Company, a corporation duly organized and existing under and by virtue of the laws of the State of Georgia and a citizen of the State of Georgia, with its residence and principal place of business in the City of Atlanta in said State, brings this, its bill of complaint, against Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas. Each of said defendants is a corporation duly organized and existing under and by virtue of the laws of the State of Arizona and each has its office and principal place of business in the City of Phoenix, Arizona, and each is a citizen of the State of Arizona and is a resident and inhabitant of the District of Arizona. The jurisdiction of this Court in this suit depends upon the following grounds, to wit:

(a) This suit is brought for injunction, preliminary and perpetual, an accounting of profits and assessment of damages against the defendants upon the ground of their joint and several infringements of the trademark of the plaintiff, "Coca-Cola" and for unfair competition on the part of the defendants.

(b) In this suit there is a controversy between citizens of different states, wherein the sum or value in controversy, to wit, the value of the trademark [1*] name "Coca-Cola" and trade insignia of

*Page-number appearing at foot of page of original certified Transcript of Record.

plaintiff for which protection is sought and the damages and injury thereto by the acts of defendants and the profits accruing to defendants by their infringing and fraudulent acts, exceeds exclusive of interest and costs, the sum or value of Three Thousand Dollars.

(c) This suit is also brought upon the ground of the joint and several infringement by the defendants in commerce conducted among the several states of the United States of the trademark "Coca-Cola" of the plaintiff, duly registered under the Act of Congress of March 3d, 1881, in the United States Patent Office on June 6th, 1887, by J. S. Pemberton, a predecessor of plaintiff, and duly registered by the plaintiff in the Patent Office of the United States, under and by virtue of the provisions of the Act of Congress of February 20, 1905, entitled "An Act to authorize the registration of trademarks used in commerce with foreign nations, among the several states of the United States or with the Indian tribes and to protect the same." Said registration relates to articles and merchandise of the same descriptive properties as the articles and merchandise upon and in connection with which the infringing mark and name used by the defendants is employed.

For its cause of action plaintiff states:

(1) That prior to the year 1886, J. S. Pemberton, of Atlanta, Georgia, began to make, according to a secret [2] formula, which is now the sole property of plaintiff, a syrup for the manufacture of a refreshing nonalcoholic beverage, and that prior to the year 1886 he adopted as the trademark therefor the

name "Coca-Cola," which was at the date of the adoption thereof, as aforesaid, in all respects new, original and distinctive and had never before been used. Said J. S. Pemberton thereupon, after use of said name "Coca-Cola" upon said syrup sold and shipped in commerce between the several states and with foreign nations, did, after application, statement and verification in due form, register and was granted a certificate of registration of said trademark name "Coca-Cola" on June 6th, 1887, as a trademark for said syrup under and by virtue of the provisions of the Act of Congress of March 3d, 1881. The said J. S. Pemberton continued alone to sell his product under the name "Coca-Cola" until about the 8th day of July, 1887, when he sold a two-thirds interest in said business to one, Lowndes, and one, Venable, and that the said Pemberton, Venable and Lowndes became and continued to be the sole and exclusive owners and proprietors of the said secret formula, business and goodwill and the trademarks connected therewith, and together continuously carried on said business until about December 14, 1887, when the said Venable and Lowndes duly sold, assigned and transferred to one Dozier and one Walker their whole interest in the said business and the goodwill thereof and in [3] all secrets, formulas, trademarks, trade names and labels used in connection with the said business, and that said Dozier, Walker and Pemberton continued to be the sole and exclusive owners and proprietors thereof and together continuously carried on said business until about the 14th day of April, 1888, when said Pemberton duly sold, assigned

and transferred all of his interest in the said secrets, formulas, business and the goodwill thereof and all trademarks and trade names used in connection therewith to Walker, Candler & Co., a copartnership composed of W. Walker, A. G. Candler and Joseph Jacobs, and that the said Walker, Candler & Co. and Dozier and said W. Walker, in his individual capacity, became and continued to be the sole and exclusive proprietors of said business and in the goodwill thereof and in all secrets, formulas, trademarks, trade names and labels used in connection with said business and together continuously carried on said business until about the 17th day of April, 1888, when said W. Walker and said Dozier duly sold, assigned and transferred to A. G. Candler one-half of their two-thirds interest in said business and in the goodwill thereof and in all secrets, formulas, trademarks, trade names and labels used in connection therewith, and that the said Walker and Dozier, A. G. Candler and Candler & Co. became and continued to be the sole and exclusive owners and proprietors of the said business and the goodwill thereof and of all formulas, trademarks, trade names and labels, and together continuously [4] carried on said business until about the 30th day of August, 1888, when the said W. Walker and the said Dozier sold, assigned and transferred to A. G. Candler all of their remaining interest in the said business and in the goodwill thereof and all formulas, trademarks, trade names and labels used in connection with the said business, and that the said Walker, Candler & Co., and A. G. Candler became and continued to be

the sole and exclusive owners and proprietors of the said business and the goodwill thereof and of all secrets, formulas, trademarks, trade names and labels used in connection therewith and together continuously carried on said business until on or about the 22d day of April, 1891, when the said Walker, Candler & Co. duly sold, assigned and transferred to Asa G. Candler (who is the same person as A. G. Candler above referred to) all of their right, title and interest in said business and in the goodwill thereof and any and all trademarks, trade names and labels used in connection therewith, and that the said Asa G. Candler became and continued to be the sole and exclusive owner and proprietor of said business and the goodwill thereof and of all trademarks, trade names and labels connected therewith, and continuously carried on said business until about the 22d day of February, 1892, when the said Asa G. Candler duly sold, assigned and transferred to plaintiff all of his right, title and interest in and to said business and in the goodwill thereof [5] and in all secrets, formulas, trademarks, trade names and labels used in connection therewith, and that plaintiff has since continued to be the sole and exclusive owner and proprietor of said business and the goodwill thereof and of all secrets, formulas, trademarks, trade names and labels and has continuously owned and conducted the said business, goodwill, secrets, formulas, and owned and used said trademarks, trade names and labels down to the present time and is now conducting and using the same. Said formula and process for the manufacture of said beverage styled "Coca-Cola"

was new and original and invented and discovered by said Pemberton and has at all times been kept and conserved by plaintiff, its predecessors and their employees as a trade and business formula, process and secret, and is now a secret formula and process and not known to the public or others than said plaintiff and its officers and employees and the predecessors of plaintiff.

(2) That continuously and without interruption plaintiff and its predecessors, during the period aforesaid from prior to 1886 to this date, have manufactured, marketed and sold syrups made under and in accordance with said secret formula and process to be used in making a tonic beverage and that since the inauguration of said business, prior to the year 1886 by plaintiff's predecessors, as alleged in the preceding paragraph, said name "Coca-Cola" has been continuously used as a trademark name for the products so made and sold by plaintiff and its said predecessors, which said [6] trademark name was at the date of its adoption by plaintiff's predecessors aforesaid, in all respects new, characteristic and distinctive and had never before been used. Said trademark name "Coca-Cola" was at the outset and always has been and is now, new, characteristic and distinctive and was adopted and has been used for the purpose of distinguishing the product of plaintiff and its predecessors from the similar products of others, and the said trademark name does now identify and distinguish the said product.

(3) Plaintiff further states that after it had become so vested with and entitled to the sole and ex-

clusive right to use the said trademark "Coca-Cola" and was the owner thereof as a trademark for syrups for the manufacture of beverages, plaintiff did, on April 22, 1905, under and by virtue of the Act of Congress, approved February 20, 1905, duly apply to the United States Patent Office for the registration of the said trademark "Coca-Cola" and thereupon did make the statement and declaration required by law for such registration and did show that said trademark had been used by plaintiff and its predecessors as a trademark for tonic beverages and syrups for the manufacture of such beverages in commerce among the several States of the United States and with foreign nations and the Indian tribes, and complied in all respects with the statute in that case made and provided and the regulations of the Commissioner of Patents, and thereupon, on the 31st day of October, 1905, registration of the said trademark "Coca-Cola" was duly allowed for tonic beverages and syrups for the manufacture of such beverages, and a [7] certificate of registration thereof was granted to plaintiff, dated October 31, 1905, and numbered 47,189, which said registration and the certificate thereof are still in full force and effect, wholly unrevoked and uncanceled. A copy of the certificate of such registration is hereto attached marked Exhibit "A."

And by virtue of the premises and by virtue of the said registration aforesaid, plaintiff is entitled to the sole and exclusive right, both generally, and specially in commerce among the several states, in foreign commerce and in commerce with the Indian tribes,

to use and employ the trademark name "Coca-Cola" or any like work as a trademark for and upon the said products and articles aforesaid, and upon merchandise of substantially the same descriptive properties and that such right of plaintiff has been generally acknowledged and acquiesced in by the trade and public.

(4) Plaintiff's product is in the form of a syrup for the manufacture of a refreshing nonalcoholic beverage, and is made by plaintiff and in some instances furnished to bottlers, who under authority from plaintiff and under the supervision and control of plaintiff add aerated water thereto, making an aerated beverage, which is then bottled and sold to dealers and consumers under a distinctive and identifying label and bottle bearing plaintiff's said trademark "Coca-Cola." Said syrup also is sold and supplied by plaintiff to soda dispensers and is by them, under the direction and instruction of plaintiff, mixed with water for consumption at soda-fountains. Plaintiff furnishes as a receptacle for its said syrup to soda [8] dispensers a distinctive and characteristic display dispensing bottle or decanter. Plaintiff's said trademark name "Coca-Cola" is used by it upon labels attached to the receptacles containing said syrup and upon labels attached to the bottles containing the aerated beverage made from plaintiff's said syrup and put out by bottlers authorized by plaintiff and has always been printed and displayed in a characteristic and distinctive style of lettering. Plaintiff's syrup has certain peculiarities of taste, color and appearance and is and long has been marketed

by plaintiff in barrels or kegs, painted with a particular share of red and readily distinguished by reason thereof, and marked with labels bearing conspicuously the trademark name "Coca-Cola," and that plaintiff's syrup has a characteristic and distinctive appearance due to the color thereof, which is arbitrary, unusual, unnecessary and was originally adopted and is now used as a means of distinguishing plaintiff's product from similar products of others, and that said color does in fact so identify and distinguish plaintiff's product in the mind of dealers, buyers, users and the public generally.

(5) Plaintiff's said product as dispensed to the public is a refreshing, nonalcoholic beverage, and is and has been very extensively advertised by plaintiff at an enormous expense and is well and favorably known throughout the United States, and the trademark name "Coca-Cola" as the name thereof has long possessed and now has a treat value and plaintiff's product sold thereunder is a meritorious and valuable article of merchandise, [9] and that the said trademark name "Coca-Cola," the original and distinctive style of lettering used therefor, the said distinctive color, appearance and characteristics of the said syrup, the barrels or kegs in which the same is contained, distinctively colored red as aforesaid, the distinctive dispensing bottles or decanters and the distinctive and characteristic labels above referred to, and the distinctive bottles and labels containing the said aerated beverage made from plaintiff's syrup and put up in such bottles with said labels by and under the authority of plaintiff, each by itself and

all in combination, identify and distinguish plaintiff's said product and point exclusively to plaintiff as the origin thereof. Plaintiff has also and does use said trademark name "Coca-Cola" in the peculiar and distinctive style and colors on its stationery, letter-heads, bill-heads and envelopes, circulars and price-lists.

(6) That the defendant, Koke Company of America, is a corporation of the State of Arizona, and was organized about September 15, 1911, and thereafter proceeded, at the City of St. Louis, Missouri, through its agents, to manufacture an extract in unnecessary and deliberate imitation in color and appearance of plaintiff's "Coca-Cola" syrup, but different therefrom and greatly inferior thereto, and said extract is by said defendant, Koke Company of America, at St. Louis, placed in barrels deliberately and purposely colored a peculiar shade of red, in imitation of plaintiff's distinctively colored barrels. Said extract is designated by said defendant "Koke" and is sold and distributed by it [10] under the said name "Koke," which said name is a fraudulent and deliberate imitation of plaintiff's trademark name "Coca-Cola." That the defendant, Koke Company of America, sells and ships from the city of St. Louis the said imitative extract under the said imitated name and in said imitative barrels to the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas, each of which is a corporation of the State of Arizona, Southern Koke Company, Limited, operating and doing business in

the City of New Orleans and The Koke Company of Texas, operating and doing business in the city of Dallas, Texas. The said extract is by said last-named corporations, used as a basis for making a syrup for sale to soda-fountains and to bottlers, from which syrup an aerated beverage can be made and is made, which said syrup resembles the Coca-Cola syrup made by plaintiff, in color, taste and appearance, and which said syrup so made from said extract by the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas, is called and styled "Koke" and "Koke Syrup" and is put up in barrels, decanters and dispensing bottles, similar in shape, size and color to the barrels, decanters and dispensing bottles used by plaintiff for Coca-Cola syrup and marked with the word "Koke" in style similar to the style of Coca-Cola as used by plaintiff upon said receptacles and which said imitative syrup and the said beverage are by said defendants and dealers who purchase from them, sold, substituted and palmed off as and for Coca-Cola syrup and beverage, and [11] that said defendants, as a matter of fact, do sell, substitute and palm off the said syrup and extract as Coca-Cola and as and for plaintiff's said Coca-Cola syrup, and that the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas all actively connive at and participate in said fraud, substitution and deception.

(7) That the adoption and use by the said defendant Koke Company of America, of the word "Koke" began many years after plaintiff's said product, under the name of "Coca-Cola" had become widely and favorably known and said word "Koke" was adopted by said defendant Koke Company of America, and is being used by said defendants and the other defendants herein named for the purpose only of imitating plaintiff's said trademark name "Coca-Cola," and to take advantage of the reputation of and demand for plaintiff's product; that defendants deliberately and intentionally and without any need or necessity make said syrup "Koke" like the "Coca-Cola" syrup of plaintiff in color, taste and appearance and in order to enable use and substitution thereof as genuine "Coca-Cola" and the beverage made therefrom to be passed off as the genuine Coca-Cola beverage. That the form in which the word "Koke" is printed by defendants and applied to the product sold by them is in deliberate and designed imitation of the characteristic and distinctive form of plaintiff's manner of printing its trademark name "Coca-Cola"; that the defendants also use and employ the word "Koke" in style and colors like the style and colors of "Coca-Cola" as used by plaintiff upon stationery, circulars and price lists and [12] small signs supplied to retailers and advertisers; that the spurious product of defendant, Koke Company of America under the said name "Koke" has in the past and is now being sold, dispensed and passed off on the public as and for plaintiff's said product, by said other defendants and their vendees; that the use

by defendants of the name "Koke" has in fact deceived the public and is now deceiving the public into the belief that the said spurious product is the product of plaintiff; and that the said passing off and deception are effectuated by the use by said defendants of said infringing name "Koke," which said name is a deceptive imitation in sound, appearance and suggestion of plaintiff's said trademark name "Coca-Cola" and is designed as such, and said deception is aided by the fact that said syrup "Koke" is placed by said defendants in barrels colored red in imitation of plaintiff's distinctive barrels and so furnished both to soda-fountain stands and dispensers and to bottlers for manufacture into an aerated beverage styled "Koke," and that said defendants have applied to aerated products put up under their alleged authority and made from the syrup "Koke" produced by said Koke Company of America, labels in imitation of plaintiff's distinctive labels upon the aerated "Coca-Cola" made by both plaintiff and authorized bottlers from genuine Coca-Cola syrup, and that the syrup product of said Koke Company of America styled "Koke" is unnecessarily and fraudulently colored in imitation of the distinctive color of plaintiff's product. Said defendants also furnish to soda dispensers bottles or decanters in deliberate imitation of plaintiff's distinctive dispensing bottles or decanters. [13]

Exhibit "B" hereto is a photograph which shows a bottle bearing plaintiff's label containing the aerated beverage produced under plaintiff's authority from genuine Coca-Cola syrup, side by side with

a bottle containing an aerated product made from the syrup "Koke" put up and labeled under alleged authority of defendant, Koke Company of America, by the defendant, Southern Koke Company, which is the Arizona corporation above named as the Southern Koke Company, Limited, defendant herein. Said bottled Koke bears a label in imitation of plaintiff's distinctive label and shows the deceptive word Koke printed thereon in said imitated type and form of lettering. Attached hereto as Exhibit "C" is a photograph of plaintiff's distinctive dispensing bottle or decanter and defendants' imitated dispensing bottle.

(8) Defendants state to both the bottlers and dispensers of "Koke" supplied as aforesaid with said false and imitative syrup "Koke" that said syrup is made under the same formula as "Coca-Cola" syrup and by one who is acquainted therewith and was at one time interested in said formula, all of which statements are false and known to defendants to be false and advise and instruct said bottlers of said aerated "Koke" syrup and retail purchasers of said aerated "Koke" and retail dealers buying and selling the same and also dispensers of "Koke" syrup to sell, substitute and palm off on buyers for use and consumption, asking for and intending to purchase genuine "Coca-Cola" made from the "Coca-Cola" syrup of plaintiff, said beverages made from said "Koke" syrup and said retailers and dispensers follow [14] said instructions and do by reason of the use of said name "Koke" in said imitative form and use of said imitative syrup, labels, signs and

receptacles, deceive buyers and users and substitute and palm off said "Koke" beverages as and for the genuine "Coca-Cola" beverages of plaintiff.

That it is the intention and design of the said defendants manufacturing and distributing said imitative and spurious "Koke" syrup and each of them by and through the use and employment of said word "Koke" the said spurious and imitative syrup and the aforesaid simulated receptacles, labels, styles, signs and devices adopted and employed in connection therewith, to enable retail dealers and dispensers who are supplied therewith thereby and therewith to substitute and pass off the spurious beverages made from said spurious syrup, in response to requests for and as the genuine Coca-Cola beverage; and that such substitution and passing off have been and are successfully and constantly accomplished by such retail dealers and dispensers and purchasers and consumers thereby deceived and defrauded. That it is also the intention and design of said defendants manufacturing and dispensing said imitative and spurious "Koke" syrup and of said defendant engaged in aerating and bottling the spurious beverage made therefrom, that through and by the use of the said word "Koke" the said imitative and spurious syrup and the aforesaid simulated receptacles, bottles, caps, styles, labels, signs and devices adopted and employed, as aforesaid, to enable retail dealers supplied with said aerated beverage put up in said bottles bearing said name "Koke" and dressed up in the fraudulent and deceptive style aforesaid thereby to substitute and pass off in response to inquiries for

the genuine "Coca-Cola" beverage [15] said spurious bottled aerated beverage, and that through and by the means aforesaid, said substitution and passing off have been and are systematically and constantly accomplished by such retail dealers and purchasers and consumers thereby deceived and defrauded.

Plaintiff, therefore, prays—

(1) That the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and the Koke Company of Arkansas, and each of them, be made parties defendant hereto, and that said defendants, and each of them, be required to answer each and every allegation herein, but not under oath, the answer of each of said defendants under oath being hereby waived.

(2) That a hearing may be had herein and the plaintiff's rights in the premises be established and adjudicated.

(3) That the said defendants, and each of them, their officers, servants, agents, employes, attorneys, licensees and assigns, and all acting by or under their authority, may be at first during the pendency of this suit and afterwards perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale or sale of any product not being the genuine product of the plaintiff the word "Coca-Cola" or any like word or the word "Koke" or any like word, or any word or name which in sound, appearance or suggestion is identical with or like the word "Coca-Cola" of the plaintiff, or the word "Koke";

from using or employing or authorizing the use or employment of labels, designs **[16]** or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices now used by the defendants; from using in connection with the sale or shipment any product, not the plaintiff's, barrels or receptacles colored in imitation of the plaintiff's said barrels or receptacles; from stating or representing that the syrup made or sold by defendants or any of them is made from the same formula as Coca-Cola syrup or that defendants or any of them may rightfully use or employ the Coca-Cola formula; from coloring or otherwise contriving any product not the plaintiff's in such a way as to be calculated to induce the belief that the same is the plaintiff's and further, from doing any act or thing, or using any name or names devices, artifices, or contrivances, which may be calculated to represent that any product not of plaintiff's production is the genuine "Coca-Cola" of plaintiff.

(4) That defendants and each of them may be required to account to plaintiff for any and all profits derived by them by reason of their unlawful conduct in the premises.

(5) That defendants may be required to pay to the plaintiff such damages as it may have sustained by reason of the defendants' unlawful conduct.

(6) That defendants may be required to pay the costs of this suit and that plaintiff may be decreed

such other and further relief as to the court may seem just.

(7) That process of this court issue directed to the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, the Koke Company of Oklahoma and the Koke Company of Arkansas, **[17]** and each of them, commanding them to be and appear before this Honorable Court at Phoenix, Arizona, on a day certain therein named, there to answer, make and abide the further order of the court.

THE COCA-COLA CO.,
CHAS H. CANDLER, V. P.,
Plaintiff.

J. E. MORRISON,
Solicitor for Plaintiff.
HAROLD HIRSCH,
FRANK F. ROGERS,
EDWARD S. ROGERS,
Of Counsel for Plaintiff. **[18]**

State of Georgia,
County of Fulton,—ss.

Charles H. Candler, being duly sworn, deposes and says that he is Vice-president of The Coca-Cola Company, plaintiff herein; that plaintiff is a corporation and affiant makes this affidavit and verification for it and in its behalf and is duly authorized so to do; that he has read the above and foregoing

Bill of Complaint and knows the contents thereof, and that the same is true.

CHAS. H. CANDLER.

Sworn to and subscribed before me this 3d day of March, 1914.

[Notarial Seal] W. A. LANDERS.

Notary Public, Fulton County, Ga. [19]

UNITED STATES PATENT OFFICE.

THE COCA COLA COMPANY, OF ATLANTA, GEORGIA.

TRADE-MARK FOR TONIC BEVERAGES AND SYRUPS FOR THE MANUFACTURE OF SUCH BEVERAGES.

No. 47,189. **Statement and Declaration.** **Registered Oct. 31, 1905.**

Application filed April 22, 1905. Serial No. 2,730

STATEMENT.

To all whom it may concern.

Be it known that THE COCA COLA COMPANY, a corporation duly organized under the laws of the State of Georgia, and located in the city of Atlanta, county of Fulton, in said State, and doing business at No. 179 Edgewood avenue, in said city of Atlanta, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark of this corporation consists of the words "COCA-COLA."

This trade-mark has been continuously used in the business of said corporation and those from whom it derived its title since about the 8th day of June, 1887.

The class of merchandise to which this trade-mark is appropriated is beverages, and the particular description of goods comprised in said class upon which this trade-mark is used is tonic beverages and syrups for the manufacture of such beverages.

The trade-mark is generally displayed on the packages containing the goods by placing thereon a printed label on which the same is shown and by printing or stamping the same thereon or by blowing the letters into the bottles or other containers of the goods.

THE COCA COLA COMPANY,
By ASA G. CANDLER,
Its President.

DECLARATION.

State of Georgia, county of Fulton, ss:

ASA G. CANDLER being duly sworn deposes and says that he is the president of the corporation the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said mark is used by said corporation in commerce among the several States of the United States and all of said States, and between the United States and foreign nations and Indian tribes, and particularly between the United States and the Republics of Mexico and Cuba, and with Canada and the five civilized tribes of Indians; that the description, drawing and specimens presented truly represent the mark sought to be registered; and that the mark has been in actual use as a trade-mark of the applicant for more than ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ASA G. CANDLER.

Subscribed and sworn to before me, Z. D. HARRISON, Clerk of the supreme court of the State of Georgia, this the 17th day of April, 1905.

[L. S.] Z. D. HARRISON.
Clerk of the Supreme Court of Georgia. [20]

EXHIBIT A.

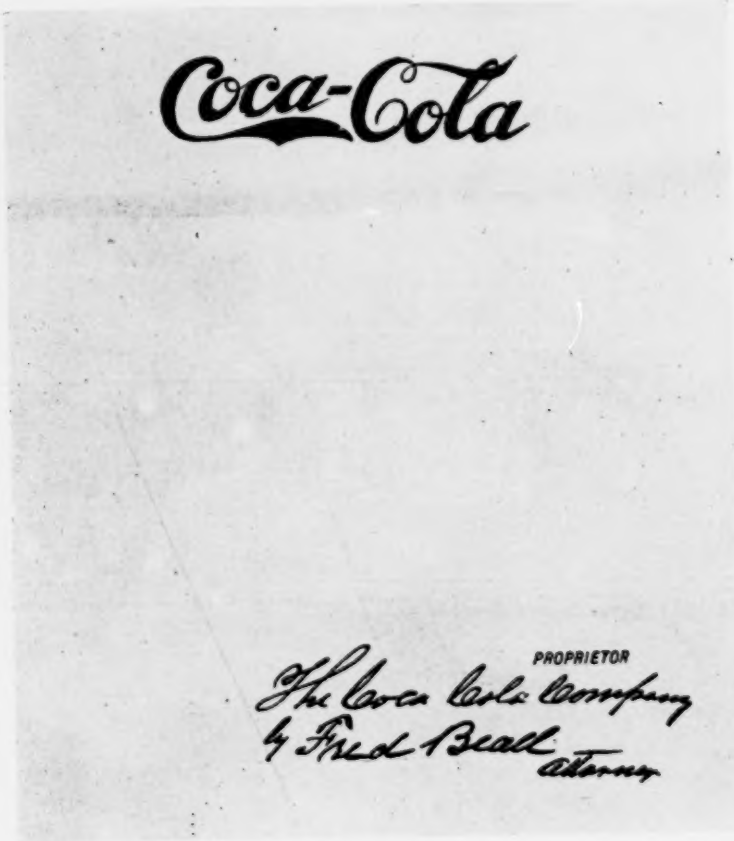
TRADE-MARK.

No. 47,189. REGISTERED OCT. 31, 1905.

THE COCA COLA COMPANY.

TONIC BEVERAGES AND SYRUPS FOR THE MANUFACTURE OF SUCH BEVERAGES.

Application Filed Apr. 22, 1905.



[21]

[22]

[23]

[Endorsements]: No. E-21. United States District Court, District of Arizona. The Coca-Cola Company vs. Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas. Bill of Complaint. Filed Apr. 25, 1914, at —— M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. **[24]**

UNITED STATES OF AMERICA.

District Court of the United States, District of Arizona.

IN EQUITY.

Subpoena ad Respondendum.

The President of the United States, Greeting: To Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas.

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States, District of Arizona, at the Courtroom in Phoenix, Arizona, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said Court by the Coca-Cola Company, a corporation duly organized and existing under and by virtue of the laws of the State of Georgia and a citizen of the State of Georgia, with its residence and principal place of business in the City of Atlanta, Georgia, and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of said District Court, this 25th day of April, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 138.

[Seal] GEORGE W. LEWIS,
Clerk.
By Robert E. L. Webb,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

You are hereby required to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill may be taken pro confesso.

GEORGE W. LEWIS,
Clerk.
By Robert E. L. Webb,
Deputy Clerk. [25]

[Endorsed]: Marshal's Docket No. 395. No. E-21 (Phoenix). U. S. District Court, District of Arizona. In Equity. Coca-Cola Company, Plff., vs. Koke Company of America et al., Defts. Subpoena ad Respondendum. Filed Apr. 28, 1914, at —— M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy.

United States Marshal's Return.

Received this writ April 25, 1914, at Phoenix, Arizona, and executed the same April 27, 1914, at Phoenix, Arizona, by delivering a true copy hereof, together with a copy of the complaint filed herein, to Vernon L. Clark, Vernon L. Clark, personally, statutory agent of the Koke Company of America; to J. H. Langston, personally, statutory agent of the Southern Koke Company, Limited; Koke Company of Texas, Koke Company of Oklahoma; and to A. W. Cole, member of the Corporation Commission of Arizona, personally, in the office of the Corporation Commission at Phoenix, Arizona, for service upon the Koke Company of Arkansas, there being no officer or statutory agent of said Koke Company of Arkansas in Arizona.

Returned this 27th day of April, 1914, at Phoenix, Arizona.

J. P. DILLON,
U. S. Marshal.
By Chas. R. Price,
Deputy.

Marshal's fees for service, $20.00

Amended Return.

Received this writ April 25, 1914, at Phoenix, Arizona, and executed the same April 27, 1914, at Phoenix, Arizona, by delivering a true copy hereof, together with a copy of the complaint filed herein, to Vernon L. Clark, personally, statutory agent of the Koke Company of America; to J. H. Langston personally, statutory agent of the Southern Koke

Company, Limited, Koke Company of Texas, Koke Company of Oklahoma; and to A. W. Cole, a member of the Corporation Commission of Arizona, personally, in the office of the corporation commission at Phoenix, Arizona, duplicate true copies of this writ and of the complaint filed herein, there being no officer or statutory agent of said Koke Company of Arkansas in Arizona.

Returned this 27th day of April, 1914, at Phoenix, Ariz.

J. P. DILLON,
U. S. Marshal.
By Chas. R. Price,
Deputy.

Marshal's fees for service, $20.00.

In the District Court of the United States for the District of Arizona.

No. E. 21—IN EQUITY.

THE COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, THE KOKE COMPANY, OF ARIZONA,
Defendants.

Answer.

To the Honorable, the Judge of the District Court of the United States for the District of Arizona.

The joint and separate answer of the Koke Company of America, the Southern Koke Company, Ltd., the Koke Company of Texas, the Koke Company of Oklahoma, and the Koke Company of Arkansas, to the original bill filed against them in this court in the above-styled cause. **[26]**

Respondents for answer to said bill say:

They do not know whether or not the plaintiff is a corporation as alleged in the bill, or whether or not it is a citizen of the State of Georgia, but demand strict proof thereof.

2.

Respondents admit that the defendants, Koke Company of America, Southern Koke Company, Ltd., and the Koke Company of Texas, are corporations duly chartered as alleged in the bill. They admit that charters were taken out for the Koke Company of Arkansas and the Koke Company of Oklahoma, but said corporations were never organized under their said charters, and never transacted any business whatever, and are not now, and were not at the time of the filing of the bill in this cause, legally in existence, their charters having been abandoned. The principal place of business of the Koke Company of America is at St. Louis, Missouri; of the Southern Koke Company, Ltd., is at New Orleans, Louisiana; and of the Koke Company of Texas is at Dallas, Texas. None of the respondents, except the Koke Company of Texas, is selling the respontents' product "Koke" in any form, or in any kind of packages or receptacles anywhere in Arizona, nor is **[27]** any of

them, with the exception of the Koke Company of Texas, doing any of the acts alleged in the bill, or admitted or set up in the answer, within the District of Arizona, nor was any one of them, except said Koke Company of Texas, so doing at the time of the filing of the bill in this cause; nor has any of them, with the exception stated, done so at any time. There is, and was at the time of the filing of the bill in this cause, a suit pending in the United States District Court for the District of Missouri, Eastern Division, wherein the Coca-Cola Company, the plaintiff in this cause, is the plaintiff, and the Koke Company of America, one of the defendants in this cause, as well as James H. Van Duesen and J. C. Mayfield, Jr., are defendants; and there is, and was at the time of the filing of the bill in this cause, a suit pending in the United States District Court for the Eastern District of Louisiana, New Orleans Division, wherein the Coca-Cola Company, the plaintiff in this cause, is the plaintiff, and the Southern Koke Company, Ltd., one of the defendants in this cause, as well as the Crecent City Seltz & Mineral Water Company, J. C. Mayfield and James L. Wright, are defendants; and there is, and was at the time of the filing of the bill in this cause, a suit pending in the United States District Court for the Northern District of Texas, Dallas Division, wherein the Coca-Cola Company, the plaintiff [28] in this cause, is the plaintiff, and the Koke Company of Texas one of the defendants in this cause, as well as George Bender, doing business as the Star Bottling Works, W. McCarty Moore, J. G. Von Winkle and

E. M. Boyd are defendants; that all of said suits involve identically the same cause of action as this suit does, the bill in this cause being substantially a copy of the bills in each of said causes; and the defendants, Koke Company of America, Southern Koke County, Ltd., and the Koke Company of Texas, plead and rely upon the pendency of said former suits as a complete defense to this suit.

3.

Respondents admit that about the year 1886, the J. S. Pemberton mentioned in the bill, began to make, according to a secret formula, a syrup for the manufacture of a refreshing, nonalcoholic beverage. They do not know whether or not the said Pemberton adopted the name "Coca-Cola" as a trademark, or trade name, for said syrup prior to the year 1886; but, for the purpose of putting that fact in issue, deny the same and demand strict proof thereof. They admit that in 1887, the said Pemberton had adopted the name "Coca-Cola Syrup," and was using it as a trademark for said syrup. They deny that the said Pemberton made any application, statement or verification for, or registered in the United States Patent Office, or was granted by the United States Commissioner of Patents, a certificate of registration of, the name "Coca-Cola," on or about June 6th or June [29] 28th, 1887, or at any other time, as a trademark for said syrup, under and by virtue of the provisions of the Act of Congress of March 3d, 1881. They admit that the said J. S. Pemberton continued alone to sell his said product under the name "Coca-Cola Syrup" until about the 8th day of July, 1887;

but they deny that on or about said date the said Pemberton sold a two-thirds interest, or any interest whatever, in said business to any one by the name of Lowndes or Venable, or to any one else. And they deny that after said date, the said Lowndes and Venable were associated with said Pemberton, or were joint or co-owners and proprietors with said Pemberton of the said secret formula, business, or goodwill, or any trademarks, trade names, or labels used in connection therewith. They deny that on or about the 14th day of December, 1887, or at any other time, the said Lowndes and Venable, or either of them, sold, assigned or transferred to any party or parties by the names of Dozier and Walker, or to any one else, any interest whatever in said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names, or labels used in connection therewith, or that the said Dozier and Walker, jointly with said Pemberton, were the sole and exclusive owners and proprietors thereof, or that said parties, together, continuously carried on said business until about the 14th day of April, 1888, or for any time whatever. They deny that on or about said last-named date the said Pemberton sold, assigned or transferred all, or any, of his interest, or any interest whatever, in said secrets, formulas, business or the goodwill thereof, or in [30] any trademarks, trade names or labels used in connection therewith to Walker, Candler & Co., or to anyone else. They deny that said Walker, Candler & Co., and Dozier, and Walker in his individual capacity, became, or continued to be the sole and exclusive proprietors of

said business, or the goodwill thereof, or of any of the secrets, formulas, trademarks, trade names, or labels used in connection therewith, or that they, together, continuously carried on said business until about the 17th day of April, 1888, or for any length of time whatever. Respondents deny that on or about said last-named date, or at any other time, the said Walker and Dozier, or either one of them, sold, assigned or transferred to A. G. Candler any interest whatever in said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names or labels used in connection therewith. They deny that the said Walker and Dozier, A. G. Candler and Candler & Company, became, or continued to be, the sole and exclusive owners and proprietors of said business, or of the goodwill thereof, or of any of the secrets, formulas, trademarks, trade names or labels used in connection therewith, or that they, together, continuously carried on said business until about the 30th of August, 1888, or for any length of time whatever. Respondents deny that the said Walker and Dozier, or either one of them, sold, assigned or transferred to A. G. Candler, all their alleged remaining interest, or any interest whatever, in said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names or labels used in connection therewith. Respondents [31] deny that the said Walker, Candler & Company, and A. G. Candler, or any of them, became, or continued to be, the sole and exclusive owners and proprietors of said business, or of the goodwill thereof, or of any of the secrets, formulas, trademarks, trade names or labels

used in connection therewith, or that they, together, continuously carried on said business until about the 22d day of April, 1891, or for any length of time whatever. They deny that the said Walker, Candler & Company sold, assigned or transferred to Asa G. Candler, or to any one else, any right, title or interest in or to said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names, or labels used in connection therewith, or that the said Asa G. Candler became, or continued to be, the sole and exclusive owner and proprietor of said business, or of the goodwill thereof, or of any of the secrets, formulas, trademarks, trade names or labels used in connection therewith; or that he continuously carried on said business, until about the 22d day of February, 1892, or for any length of time whatever. Respondents deny that the said A. G. Candler, sold, assigned or transferred to the plaintiff any right, title or interest in or to said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names or labels used in connection therewith, or that the plaintiff has since continued to be the sole and exclusive owner and proprietor thereof, or that it has continuously owned and conducted said business, goodwill, secrets, and formulas, or continuously owned and used any of the trademarks, trade names or labels [32] used in connection therewith, down to the present time, or that it now owns same, or is conducting said business.

4.

Respondents admit, however, that the plaintiff is now using the name "Coca-Cola," and labels bearing

said name, in connection with the extract, syrup and beverage which it is now manufacturing, marketing and selling. The adoption and use by plaintiff, or those through whom it claims of the name "Coca-Cola," and of the labels bearing said name, began subsequent to the adoption and use by respondents and their predecessors of their trademark name "Koke," and of labels bearing said name, and after respondents and their predecessors had begun to manufacture, market and sell their extract, syrup and beverage under said trademark name "Koke" in receptacles so labeled with said name. Respondents deny that the plaintiff is the legitimate successor in business of the said J. S. Pemberton, or the legitimate successor to, or owner of, the business and goodwill originally conducted by said Pemberton, or any of the secrets, formulas, trademarks, trade names or labels used in connection therewith.

5.

Respondents do not know whether or not the formula and process for the manufacturing of said extract, and syrup originally manufactured, marketed and sold by the said J. S. Pemberton, was new and original, or that it was invented or discovered by said Pemberton, but they demand strict proof of this allegation of the bill. [33]

6.

Respondents deny that the formula and process for the manufacturing of said extract, syrup and beverage, has at all times been kept and conserved by the plaintiff, or its predecessors, or their employees as a trade or business formula, process or secret, or that

it is now a secret formula, or process, or that it is not known to others than the plaintiff, its officers or employees, or the predecessors of plaintiff.

7.

Respondents would respectfully show the Court that in September or October, 1887, the said J. S. Pemberton was engaged in Atlanta, Georgia, in the business of manufacturing, marketing and selling various medicines, compounds, syrups, extracts and mixtures, known respectively as "French Wine Coca," "Globe Flower Cough Syrup"; "Indian Queen Hair Dye," "Gingerine" and "Coca-Cola Syrup"; that in September or October, 1887, the said J. S. Pemberton advertised in the "Atlanta Constitution," a newspaper published in Atlanta, Georgia, for a partner or partners, to join him in said business; that this advertisement was answered by the defendant, J. C. Mayfield, and by E. H. Bloodworth and A. O. Murphy; that thereupon the said J. C. Mayfield, E. H. Bloodworth and A. O. Murphy entered into a partnership with the said J. S. Pemberton for the purpose of carrying on and conducting said business; that articles of partnership were drawn up in writing, [34] and that, by the terms of said agreement, J. C. Mayfield, E. H. Bloodworth and A. O. Murphy, were each to pay into the said partnership $2,000 in cash, and the said J. S. Pemberton was to sell and convey to each of said parties a one-fourth undivided interest in said business, including the formula and secret process for manufacturing said "Coca-Cola Syrup," and the business of manufacturing, marketing and selling the same, and

the goodwill thereof, and all the trademarks, trade names and labels used in connection therewith, the said J. S. Pemberton retaining a one-fourth undivided interest in the same; that in conformity with said agreement, the said J. C. Mayfield, E. H. Bloodworth and A. O. Murphy did each pay into the partnership said sum of Two Thousand Dollars in cash, and the said J. S. Pemberton, did, in fact, sell, assign, transfer and convey, by an instrument in writing, and in the manner required by the Act of Congress of March 3, 1881, to each of said parties, a one-fourth undivided interest in said business, including the business of manufacturing, marketing and selling said "Coca-Cola Syrup," and the goodwill thereof, and all the secrets, formulas, trademarks, trade names and labels used in connection therewith; that this occurred on or about the 14th day of January, 1888; that thereafter, the said J. S. Pemberton, A. O. Murphy, J. C. Mayfield and E. H. Bloodworth, as partners, doing business under the firm name and style of The Pemberton Medicine Company, continuously carried on said business aforesaid, and owned, manufactured, marketed and sold said products, including said "Coca-Cola syrup," and sold said "Coca-Cola Syrup" [35] under the trade name of "Coca-Cola Syrup," until about the 1st day of April, 1888, when the said J. S. Pemberton informed his said partners that he wanted to give the name "Coca-Cola Syrup" to his son, Charlie Pemberton. At that time the name "Coca-Cola Syrup" as applied to said extract or syrup, was not extensively known, and did not possess great value. The said J. S. Pemberton

represented to his said partners that, in as much as said business was practically in its infancy, and inasmuch as said name "Coca-Cola Syrup" was not extensively known, the name of the product which they were then manufacturing, marketing and selling under the name "Coca-Cola Syrup," could be as readily manufactured, marketed and sold under the name of "Koke," and that, if his said partners would agree to change the name of said product from "Coca-Cola Syrup" to "Koke," he would be enabled to humor his said son, and the business would not suffer by reason of the changing of the name. The said J. S. Pemberton was cranky, erratic and hard to get on with, and his partners realized that the business would progress more smoothly and harmoniously if they humored him in his whims and desires. Accordingly, on or about the first day of April, 1888, said partners agreed to change the name of their said product from "Coca-Cola Syrup" to that of "Koke," and to manufacture, market and sell it thereafter under the name of "Koke." Neither the said Mayfield, Murphy nor Bloodworth, however, agreed to any sale, assignment or transfer of any trademark in the name "Coca-Cola" or "Coca-Cola Syrup," or of any rights arising from the [36] registration in the United States Patent Office, of any labels bearing the name "Coca-Cola" or "Coca-Cola Syrup," or any interest in the business of manufacturing, marketing and selling said product, or in the goodwill thereof, or in any of the secrets, or formulas used in manufacturing the same, to said Pemberton's son, Charlie Pemberton, or to any one else. Respondents

do not know whether or not the said J. S. Pemberton attempted to sell, assign or transfer his interest, or any interest, in the name "Coca-Cola," or "Coca-Cola Syrup," or in any rights arising from any registration in the United States Patent Office of any label bearing said name, to his said son, Charlie Pemberton, but if he did, said attempt was ineffectual to accomplish the purpose intended, and did not confer any rights whatever upon the said Charlie Pemberton, because such sale, assignment or transfer, if any in fact was made, was not made in writing, and was not registered within the time, and in the manner required by law, and the rules and regulations of the United States Commissioner of Patents in the United States Patent Office, and was not made in connection with any sale of the business, or of the goodwill connected therewith.

8.

From and after about April 1st, 1888, the said Pemberton Medicine Company, the partnership composed of the partners aforesaid, began and continued to manufacture, market and sell, in interstate commerce, under the trade name of "Koke," in receptacles labeled with said trade name "Koke," [37] said identical product which they had theretofore manufactured, marketed and sold under the name of "Coca-Cola," or "Coca-Cola Syrup," until about the 11th day of June, 1888, when the said A. O. Murphy retired from the partnership. On said date articles of dissolution were drawn up by said partners, by the terms of which the said A. O. Murphy sold, assigned and transferred to the remaining partners all his in-

terest in said business, and in the goodwill thereof, including the business of manufacturing, marketing and selling said extract, syrup and beverage, theretofore known and sold under the name of "Coca-Cola," or "Coca-Cola Syrup," and "Koke" and all the secrets, formulas, trademarks, trade names and labels used in connection therewith. Thereupon, said remaining partners, J. S. Pemberton, J. C. Mayfield and E. H. Bloodworth, formed a partnership for the purpose of carrying on and continuing said business, and did carry on and continue the same, continuously and continuously manufactured, marketed and sold said product under said name of "Koke," in receptacles labeled with said trade name "Koke," until about the middle of July, 1888, when the said J. S. Pemberton died. Thereupon the said J. C. Mayfield and E. H. Bloodworth made a settlement with the widow and heirs of the said J. S. Pemberton, deceased, whereby the secret processes and formulas for making "Globe Flower Cough Syrup," "Indian Queen Hair Dye," and "Gingerine," together with the business and the goodwill thereof, and the trademarks, trade names and labels used in connection with said products, were transferred to said widow and heirs, and the said J. C. Mayfield and E. H. Bloodworth [38] retained the formulas and secret processes for making "French Wine Coca," and the "Coca-Cola" or "Koke" syrup aforesaid, and the business and goodwill thereof, and all trademarks, trade names and labels used in connection therewith. Thereupon the said J. C. Mayfield and E. H. Bloodworth, jointly and as partners, continued to manufacture, market and

sell said products, styled "French Wine Coca," and "Koke," and to market and sell the same under said names "French Wine Coca," and "Koke" respectively, in interstate commerce, in receptacles labeled with said names, until about 1893, when they sold the formula for making "French Wine Coca," and the business and goodwill, trademarks, trade names and labels, etc., connected therewith, to outside parties. Thereafter the said J. C. Mayfield and E. H. Bloodworth, jointly, as partners, continued to manufacture, market and sell in interstate commerce, in receptacles labeled with the name "Koke," said identical extract, syrup and beverage, which they had theretofore manufactured and sold under the names of "Coca-Cola" or "Coca-Cola Syrup," and "Koke," and continuously owned, manufactured, marketed and sold the same in interstate commerce, under the trade name of "Koke," in receptacles so labeled, until 1895, when the said J. C. Mayfield bought all of the interest of the said E. H. Bloodworth in said business, and in the goodwill thereof, and in all the secrets, formulas, trademarks, trade names and labels used in connection therewith. From and after said time the said J. C. Mayfield continuously owned, manufactured, marketed and sold said product [39] under the trademark name of "Koke" in interstate commerce, in receptacles labeled with said name "Koke" until about the 15th day of September, 1911, when the Koke Company of America, the corporation of that name mentioned in the original bill in this cause, was organized and chartered. On or about

said date, the said J. C. Mayfield sold, assigned and transferred to said Koke Company of America, said secret process and formula and all of his interest in said business, and the goodwill thereof, and all the trademarks, trade names and labels, used in connection therewith. From and since said date the said Koke Company of America became, and continued to be, the owner and proprietor of said business, and of the goodwill thereof, and all the secrets, formulas, trademarks, trade names and labels used in connection therewith, and continuously owned, manufactured, marketed and sold said product under the trademark name of "Koke" in interstate commerce, in receptacles labeled with said name "Koke," and continuously owned and used said trademarks, trade names and labels in connection therewith down to the present time, and said company now owns, and is the proprietor of said business and the goodwill thereof, and of all the secrets, formulas, trademarks, trade names, and labels used in connection therewith, and now owns and conducts said business.

9.

On or about the 22d day of October, 1912, said Koke Company of America granted to the defendant, The Southern [40] Koke Company, Ltd., a license to manufacture, market and sell said "Koke" syrup and to aerate and bottle the same and sell it in bottles within the State of Louisiana and various other states; and said defendant has since continuously, up to this time, manufactured, marketed and sold said "Koke" syrup under the trademark name of "Koke."

10.

On or about the —— day of ————, said Koke Company of America, granted to the defendant, the Koke Company of Texas, a license to manufacture, market and sell said "Koke" syrup, and to aerate and bottle the same, and sell it in bottles within the State of Texas, and various other states; and said defendant has continuously up to this time manufactured, marketed and sold said "Koke" syrup under the trademark name of "Koke."

11.

On the 10th day of November, 1898, W. L. Bitting of Sherman, Texas, after application, statement and verification in due form, deposited in the United States Patent Office a label entitled and bearing the name "Koke" in black letters, for registration, under and by authority of the provisions of the Act of Congress approved June 18th, 1874, entitled, "An Act to Amend the law relating to Patents, Trademarks, and Copyrights." On the 27th day of December, 1898, said label was duly registered in the United States Patent Office in accordance with the provisions of said act, and the certificate of such registration was granted to the said Bitting by the United [41] States Commissioner of Patents, a copy of which said certificate is hereto attached and made a part of this answer, and is marked for identification Exhibit "A." The original will be produced on or before the hearing. Said W. L. Bitting thereafter continuously used said label in interstate commerce, and in commerce with foreign nations and with the Indian Tribes upon receptacles containing

his said product until the 21st day of October, 1913.

12.

The said W. L. Bitting, after continuously using in interstate commerce and in commerce with foreign nations and with the Indian tribes, said name "Koke," as a trademark or trade name, for an extract, syrup or beverage similar to plaintiff's product, from about the 10th day of November, 1898, did, on the 21st day of August, 1911 duly file in the United States Patent Office an application to have said name registered under and by virtue of the provisions of the Act of Congress approved February 20th, 1905, and the amendments thereto of 1906, 1907 and 1909, as a trademark for his said product, after making in due form and filing in the United States Patent Office, the statement, declaration and verification required by law.

13.

On the 21st day of October, 1913, the said W. L. Bitting executed in writing, in the State of Texas, and acknowledged in the manner required by the laws of said state, an [42] assignment of said label "Koke" aforesaid, and the business of manufacturing, marketing and selling the product with which said label was used, and the good-will thereof, to the Koke Company of America, the corporation of that name mentioned in the original bill filed in this cause, and said assignment was duly recorded on the 28th day of October, 1913, in the office of the United States Commissioner of Patents as required by law. The said Bitting, also, in the same instrument, executed and acknowledged as aforesaid, sold and as-

signed to said Koke Company of America, said trademark name "Koke" together with the business of manufacturing, marketing and selling the product with which said name was used, and the goodwill thereof, and recorded the same on the 28th day of October, 1913, in the office of the United States Commissioner of Patents as required by said Trademark Act of 1905, and the amendments thereto. A copy of said assignment and the certificate of registration of the same is hereto attached, and made a part of this answer, marked for identification, Exhibit "B."

14.

Thereupon, after said assignment had been duly recorded in the United States Patent Office as aforesaid, said name "Koke" was duly registered as a trademark, and a certificate of registration of said trademark name "Koke" was duly granted by the United States Commissioner of Patents to said Koke Company of America, as the assignee of said W. L. Bitting, on the 13th day of January, 1914. A copy of said certificate of registration, together with a copy of the application, [43] statement, declaration and verification as made by said Bitting as aforesaid, is hereto attached and made a part of this answer, and marked Exhibit "C" to the same.

15.

The Murfreesboro Bottling Works, a corporation organized and existing under and by virtue of the laws of the State of Tennessee, after having previously used from May 1st, 1902, in interstate commerce, and in commerce with foreign nations and

among the Indian tribes, the name "Koke," in the identical script and style of lettering as said name is now used by the respondents, as a trademark for an extract, syrup and beverage similar to plaintiff's said product, on the 10th day of April, 1905, duly made and filed in the United States Patent Office and application to have said name "Koke," printed in said script and style of lettering registered as a trademark, and said Company, by its Secretary, J. W. Huggins, duly made and filed in said office the statement, declaration and verification required by law and said trademark was duly registered in the United States Patent Office, in the name of Murfreesboro Bottling Works, as a trademark on the 21st day of August, 1906, and on said date a certificate of such registration was granted to said Company by the United States Commissioner of Patents. A copy of said certificate is hereto attached and made a part of this answer, marked Exhibit "D" to the same. [44]

16.

Thereafter said corporation was dissolved and S. B. Christy, C. B. Huggins, J. W. Huggins and Christy & Huggins Company, a partnership composed of said S. B. Christy, C. B. Huggins and J. W. Huggins, who were the owners of all the capital stock of said corporation, succeeded to and became the owners of said trademark, and the business theretofore carried on by said corporation, and the goodwill thereof. Thereupon said parties formed a partnership for the purpose of owning and using said trademark and carrying on and conducting said

business, which said partnership was designated by them as the Murfreesboro Bottling Works. Thereupon, on the 28th day of November, 1911, said parties aforesaid, duly sold, assigned and transferred to the Koke Company of America, aforesaid, by an instrument in writing, duly executed and acknowledged according to the laws of the State of Tennessee, in which said assignment was made, said trademark name "Koke," written in said script and style of lettering aforesaid, and the said business theretofore conducted by them, and the goodwill thereof. Said assignment was duly filed and recorded in the United States Patent Office on the 12th day of December, 1911, and on said date a certificate certifying that fact was duly granted to said Koke Company of America by the United States Commissioner of Patents. A copy of said assignment and certificate is hereto attached and made a part of this answer, marked Exhibit "E" to the same. [45]

17.

On the 14th day of October, 1911, the Koke Company of America, after duly complying in all respects with the requirements of the laws of the Republic of Mexico, duly registered and was granted a certificate of such registration, of a trademark for the product now manufactured, marketed and sold by said Koke Company of America, and the defendants herein, under that name, consisting of the word "Koke" printed in the same script and style of lettering as it is now used and printed by said Koke Company of America, and the defendants herein and applied to their said product. A copy of said cer-

tificate is hereto attached and made a part of this answer, and is marked Exhibit "F" to the same.

18.

On the 12th day of April, 1913, said Koke Company of America, after fully complying in all respects with the laws of the Dominion of Canada, applicable thereto, duly registered, and was granted a certificate of such registration of said name "Koke" printed in the same script and style of lettering as it is now printed and used by said corporation and by the defendants herein as a trademark for the products which said Company and the respondents herein are now manufacturing, marketing and selling under said trademark name. A copy of said certificate of registration is hereto attached, and made a part of this answer, marked Exhibit "G" to the same. **[46]**

19.

Respondents deny that either the plaintiff or its predecessors, has, or have, continuously, and without interruption, during the period from prior to 1886 up to this time, manufactured marketed and sold said syrups made under and in accordance with the secret formula and process originally belonging to said J. S. Pemberton to be used in the making of a tonic, beverage, or under and in accordance with the formula and process which they are now using.

20.

Respondents deny that since prior to the year 1886, the name "Coca-Cola" has been continuously used as the trademark name for the products made and sold by the plaintiff or its predecessors. They

deny that the name "Coca-Cola" was at the outset, always has been, or is now, original, new, characteristic or distinctive.

21.

If the resemblance between the name "Coca-Cola" and respondents' trademark name "Koke" is so close as to be likely to cause confusion or deception in the minds of the public, or to deceive purchasers, which respondents deny, then, respondents deny that the name "Coca-Cola" was adopted, or has been used, for the purpose of distinguishing the product of the plaintiff and its predecessors from similar products of others, and they deny that said name does now identify or distinguish the plaintiff's said product. On the contrary, [47] the product of respondents was, prior to the adoption and use of the name "Coca-Cola" by the plaintiff, or its predecessors, and since continuously has been, owned, manufactured, marketed and sold by respondents and their predecessors under the name of "Koke."

22.

If the resemblance between said name "Coca-Cola" and the respondents' trademark name "Koke" is so close as to be likely to cause confusion or deception in the minds of the public, or to deceive purchasers, which respondents deny, then the statement and declaration which the plaintiff alleges it made on or about April 22d, 1905, in connection with its application to the Commissioner of Patents for the registration of said name "Coca-Cola" as a trademark, was false, and the registration of said name was fraudulently procured, because said state-

ment and declaration contained the false and fraudulent statement and representation that the plaintiff was the sole and exclusive owner of the trademark name "Coca-Cola," and was solely and exclusively using said name to distinguish its said product from the products of others, and that no other person, firm, corporation or association had the right to use, or was using said trademark, either in the identical form, or in such near resemblance thereto as might be calculated to deceive; and because said statement and declaration contained the false and fraudulent statement and representation that plaintiff's said product to which it applied said name "Coca-Cola" was a nonalcoholic beverage made from an extract of Coca leaves [48] and Cola nuts, and consequently, said name was improperly registered, and the registration thereof was invalid, and conferred no right upon the plaintiff to the use and protection of said name "Coca-Cola" as a trademark, as applied to plaintiff's said product, under and by virtue of the provisions of said act of February 20, 1905, inasmuch as the respondents, their predecessors and those through whom they claim, were at that time, and had been for many years prior thereto, the owners of, and using their said trademark name "Koke," and applying it to their said product, and inasmuch as plaintiff's said product "Coca-Cola" was not then, and is not now, a nonalcoholic beverage, nor was it then, nor is it now, made from an extract of Coca leaves and Cola nuts and inasmuch as W. L. Bitting, of Sherman, Texas, aforesaid, continuously used said name "Koke" as a trademark for products similar

to plaintiff's said product, in interstate and foreign commerce, and in commerce among the Indian tribes from about 1898 until October 21, 1913; and inasmuch as the Murfreesboro Bottling Works, continuously used said name "Koke" in the same script and style of lettering as the respondents now use it as a trademark for products similar to plaintiff's product in interstate and foreign commerce, and in commerce with the Indian tribes from May 1st, 1902, until the 28th day of November, 1911.

23.

Respondents are advised and charge that the alleged registration by plaintiff of said name "Coca-Cola" as aforesaid, under and by virtue of the provisions of the Act of Congress [49] approved February 20, 1905, was invalid, and conferred no right upon the plaintiff to the use or protection of said name "Coca-Cola" as a trademark as applied to plaintiff's said product; because, at the time of said alleged registration, said name "Coca-Cola" was descriptive of the goods with which it was used, and of the articles to which it was applied, and of the contents, ingredients, character and quality of the same; and because neither the plaintiff nor its predecessors was, or were, actually solely and exclusively using said name "Coca-Cola" as a trademark, nor had they, or any of them, solely and exclusively used said name as a trademark during any portion of the ten years next preceding the 20th of February, 1905, if in fact the resemblance between said name "Coca-Cola" and respondents' trademark name "Koke" is so close as to be likely to cause confusion

and deception in the minds of the public, or to deceive purchasers, which respondents deny, inasmuch as the respondents, their predecessors, and those through whom they claim had, during all of said time, owned and used their said trademark name "Koke" and applied it to their said product; and inasmuch as W. L. Bitting, of Sherman, Texas, aforesaid, continuously used, said name "Koke" as a trademark for products similar to plaintiff's said product in interstate and foreign commerce, and in commerce among the Indian Tribes, from about 1898 until October 21st, 1913; and inasmuch as the Murfreesboro Bottling Works, aforesaid, continuously used said name "Koke" in the same script and style of lettering as the respondents now use it, as a trademark for products similar to plaintiff's said product in interstate and foreign commerce, and in commerce with the Indian [50] Tribes, from May 1st, 1902, until the 28th day of November, 1911.

24.

Respondents are advised and charge that no suit can be maintained by the plaintiff under and by virtue of the provisions of said Trademark Act of February 20, 1905, for an infringement of said alleged trademark name "Coca-Cola," or for the protection of said name as a trademark; first, because said alleged trademark is, and was at the time of said alleged registration under said Act, used upon an article injurious in itself, in that the plaintiff's said product is, and was at the time of the said alleged registration, injurious and deleterious to health; and, second, because said alleged trademark

is, and was at the time of said alleged registration, used by plaintiff in an unlawful business; (1) in that the plaintiff's said product, "Coca-Cola," is misbranded within the meaning of section 8, sub-section one of the Food and Drugs Act of June 30th, 1906, because the plaintiff's said product is labeled and branded with the name "Coca-Cola," and said words "Coca-Cola," as thus employed, are a representation of the presence in said food product of the substances coca and cola nuts or at least of an extract derived from coca leaves and cola. There are substances known as Coca and Cola under their own distinctive names, or, at least, substances known as the Coca leaf and the Cola nut, under their own distinctive names, but plaintiff's food product "Coca-Cola" contains no Coca, and no Coca leaf, and no extract derived therefrom, and little, if any, Cola, or Cola nut, and little, if any, extract derived therefrom. Hence, **[51]** plaintiff's said product is, (a) an imitation of the articles or substances, Coca and Cola, or the Coca leaf and the Cola nut; and, (b) is offered for sale under the distinctive names of said articles. And plaintiff's said product is misbranded within the meaning of sub-sections two and four of section eight of the Food and Drugs Act of June 30th, 1906, (a), in that plaintiff labels the receptacles containing its said product with labels bearing thereon said name "Coca-Cola," and a pictorial design, or picture of Coca leaves and Cola nuts, which said design or picture, together with said name "Coca-Cola," are a representation that plaintiff's said product contains Coca and Cola, or

extracts derived from the Coca leaf and the Cola nut, when, in fact, it contains neither, or at least, no appreciable quantity of either; and, (b), in that plaintiff's said product so labeled with said labels, bearing said name "Coca-Cola" and said pictures of said Coca leaves and Cola nuts, is labeled or branded so as to deceive and mislead purchasers into the belief that its said product contains Coca and Cola, or extracts from the Coca leaf and the Cola nut, when, in fact, it does not, or at least, contains no appreciable quantity thereof. And said alleged trademark is used in unlawful business (2) in that, plaintiff's said product is adulterated, within the meaning of sub-sections 2, 3 and 5, of section 7 of said Food and Drugs Act of June 30, 1906, in that (a) the substance of Caffeine, derived from tea leaves, coffee beans and other sources, has been substituted for cola, or the cola nut, or extracts derived therefrom, and a twenty per cent solution of alcohol has been substituted for Coca or the Coca leaf, **[52]** or extracts derived therefrom; (b) in that all the substantial and valuable constituents of the said Coca and Cola, or of the said coca leaf and cola nut, have been wholly, or in part, extracted from plaintiff's said product; and (c), in that plaintiff's said product contains, as an added ingredient, a large quantity of caffeine, which is a poisonous substance, and which renders plaintiff's said product deleterious to health.

25.

If, in fact said name "Coca-Cola" was registered as a trademark in 1887, by J. S. Pemberton, as al-

leged in the bill under and by virtue of the provisions of the Act of Congress of March 3d, 1881, which respondents deny, then said alleged registration was invalid and conferred no right to the use and protection of said name as a trademark, under and by virtue of the provisions of said Act; because, at the time of said alleged registration said name "Coca-Cola," as at that time applied to the said J. S. Pemberton's product, was descriptive of the goods with which it was used and of the articles to which it was applied, and of the contents, ingredients, character and quality of such goods and articles, and because said alleged registration was procured by fraud, in that the said Pemberton falsely and fraudulenty stated and represented to the Commissioner of Patents, in order to procure the registration of said name as a trademark, that said name was then used, and had been used prior thereto by him as a trademark for his said product in foreign commerce, and in commerce with the Indian Tribes when, in truth, and in fact, it was not then used, and had never **[53]** been used prior thereto, by him or anyone else, as a trademark for his said product in such commerce; and because, as a matetr of fact, said name was not at the time of said alleged registration, and had never been prior thereto, used by said Pemberton, or anyone else, as a trademark for his said product in such commerce.

26.

If in fact the said J. S. Pemberton ever attempted to sell, assign, or transfer said alleged trademark, or

any interest therein, to the plaintiff, or any of its predecessors, or to those through whom it claims, which respondents deny, then said alleged sale, assignment or transfer was invalid and conferred no right upon said alleged vendees to the use or protection of said name "Coca-Cola," as a trademark; because, respondents charge upon information and belief, said alleged assignment or transfer was not made in writing, and was not acknowledged or recorded in the United States Patent Office as required by the provisions of said act, and the rules and regulations of the United States Commissioner of Patents in force at the time of said alleged assignment; and, because, said alleged assignment was not made in connection with the sale of the business and goodwill connected with said alleged trademark.

27.

Respondents charge, upon information and belief, that none of the alleged assignments of said alleged trademark **[54]** by the various alleged predecessors of plaintiff to their alleged successors, was made in writing and acknowledged and recorded in the United States Patent Office as required by the provisions of said act of March 3d, 1881, and the rules and regulations of the United States Commissioner of Patents in force at the time of said alleged assignments.

28.

Respondents deny that the plaintiff is the owner of any trademark in said name "Coca-Cola," or that it is entitled to the exclusive right, either generally

or specially, in interstate and foreign commerce, or in commerce with the Indian Tribes, to use and employ said name "Coca-Cola," or any like word, as a trademark for, or upon the plaintiff's said product, or upon merchandise of substantially the same descriptive properties, and they deny that any such alleged right has been generally acknowledged and acquiesced in by the trade and public.

29.

Respondents admit that plaintiff's product is in the form of a syrup for the manufacture of a refreshing beverage. They deny that plaintiff's said beverage is nonalcoholic. They suppose plaintiff's product is made up by, and, in some instances, furnished to, bottlers, who, under authority from plaintiff, and under the supervision and control of plaintiff, add aerated water thereto, making an aerated beverage which is then bottled and sold to dealers in bottles bearing said name **[55]** "Coca-Cola." But respondents deny that said aerated beverage is sold to dealers or consumers under a distinctive or identifying label or bottle. The bottles used by plaintiff, as aforesaid, are neither distinctive nor identifying, either in color, shape, size, design or appearance, nor do they point exclusively to the plaintiff as the origin thereof. The plaintiff does not use exclusively, and its product is not put up exclusively in, bottles of any uniform color, shape, size, design or appearance. Various other similar products are bottled and sold in the market generally by the various manufacturers thereof, and dealers therein, in bottles of the same size, color, shape,

design and appearance as those in which plaintiff's product is bottled and sold; and were so bottled and sold by such various manufacturers and dealers in bottles of said size, color, shape, design and appearance, before, and at the time when, plaintiff, or its predecessors, began to bottle its said product in bottles of that kind, and since continuously have been, and are now. In fact, various other similar products are bottled and sold by and under authority of plaintiff in plaintiff's second-hand bottles bearing said name "Coca-Cola" blown thereon in the glass. Bottles of said size, color, shape, design and appearance were in general use by the manufacturers of, and dealers in, various other similar products, in the bottling of their said products, before, and at the time when, plaintiff, or its predecessors, adopted and began to use bottles of that character, and since continuously have been, and are now, in such general use. **[56]**

30.

Respondents admit that the name "Coca-Cola" is used by plaintiff upon labels attached to receptacles containing plaintiff's said syrup, and, in a few places here and there, upon labels attached to the bottles containing the aerated product made from plaintiff's said syrup. They deny, however, that said name has always been printed or displayed in a characteristic or distinctive style of lettering or that said style of lettering identifies or distinguishes plaintiff's product from similar products of others, or points exclusively to the plaintiff as the origin thereof. The style of lettering in which plaintiff

prints said name "Coca-Cola" upon labels attached to receptacles containing plaintiff's said product is not uniform, and has never been uniformly the same, but is now, and has always been, used in various different styles, sometimes in block letters, and in various other styles. The same style of lettering as that used by plaintiff, as aforesaid, was in general use in a similar manner by the manufacturers of, and dealers in, various other similar products upon labels attached to the receptacles containing their said products before, and at the time when, plaintiff or its predecessors, adopted and began to use said style of lettering, and has since continued to be, and is now, in such general use.

31.

Respondents admit that plaintiff's said syrup is [57] also sold and supplied to soda dispensers, and that it is by them mixed with water and sold for consumption at soda-fountains. They admit that in some instances plaintiff furnishes as receptacles for its said syrup, to soda-fountains and dispensers, dispensing bottles or decanters; but they deny that said dispensing bottles or decanters are distinctive or characteristic, or that they identify or distinguish plaintiff's said product from similar products of others, or point exclusively to the plaintiff as the origin thereof. Dispensing bottles, decanters and receptacles of the same color, shape, design, size and appearance, as those which plaintiff furnishes to soda-fountains and dispensers, and authorizes them to use, as receptacles for its said syrup, were in general use as receptacles for the various similar

products of others in the various soda-fountains and dispensing places throughout the country before, and at the time when, plaintiff or its predecessors, first adopted and began to use dispensing bottles, decanters and receptacles of such description, or to furnish them to soda-fountains and dispensers, and since continuously have been, and are now, in such general use. The plaintiff does not use, nor does it furnish to soda dispensers, or require them to use, dispensing bottles, decanters or receptacles of any uniform shape, size, design, color or appearance, but it furnishes to said soda-fountain dispensers, and its product is put up and exhibited to the public by them in dispensing bottles, decanters and receptacles of various different colors, shapes, sizes, designs and appearance, and the name "Coca-Cola" is printed thereon in various and different styles of lettering and colors. **[58]**

32.

Respondents deny that plaintiff's syrup has any peculiarity of taste, color or appearance, or any characteristic or distinctive appearance due to the color thereof, or that either the color, taste or appearance thereof, or all combined, is, or are, characteristic or distinctive, or identify or distinguish plaintiff's product from the similar products of others, or that any of them, or all combined, point exclusively to the plaintiff as the origin thereof. Various similar products, of various other manufacturers and dealers, of the same color and appearnace as plaintiff's said product, were known and sold generally in the market before, and at the time when,

plaintiff, and its predecessors, began to manufacture, market and sell its said product, and have since continuously been, and are now, generally known and sold in the market. Before, and at the time when, plaintiff, and its predecessors, began to manufacture, market and sell their said product, respondents' product was known and sold in the market and possessed the same color, taste and appearance as it now does, and has ever since then been, and is now, known and sold in the market, and has always possessed, and now possesses, the same color, taste and appearance. Respondents do not know whether the color of plaintiff's product is arbitrary or unnecessary, and therefore deny that it is, and demand strict proof of that allegation. They deny that the color of plaintiff's product is unusual. They deny that the color or appearance of plaintiff's product was originally adopted, or that it is now used, as a means of distinguishing plaintiff's product **[59]** from similar products of others, and they deny that said color and appearance do, in fact so identify or distinguish plaintiff's said product in the minds of dealers, buyers, users or the general public.

33.

Respondents admit that the plaintiff is now marketing its syrup in barrels and kegs painted red, but they do not know how long plaintiff has been marketing its said product in barrels and kegs painted said color, except that they do know that respondents and their predecessors marketed their syrup in kegs and barrels painted red before, and at the time

when, the plaintiff and its predecessors began to so market its syrup, and have since continuously done so. They deny that the shade of red used by plaintiff in painting its said barrels and kegs is peculiar, or that it readily identifies or distinguishes plaintiff's barrels and kegs by reason thereof, or points exclusively to the plaintiff as the origin thereof. Respondents deny that the size, shape and design of plaintiff's barrels and kegs are characteristic or distinctive, or that they identify or distinguish plaintiff's said product from similar products of others, or point exclusively to the plaintiff as the origin thereof. Various other manufacturers of, and dealers in, similar products marketed their said products in barrels and kegs painted red, and substantially the same shade of red as plaintiff's barrels and kegs are now painted, and in barrels and kegs of the same size, shape and design as those in which plaintiff's product is now marketed, before and at the time when, plaintiff **[60]** and its predecessors began to so market its said product, and have since continuously done so, and are now doing so. Said color was in general use as a color for barrels and kegs containing products similar to plaintiff's and the size, shape and design of said barrels and kegs were in such general use, before, and at the time, when, plaintiff and its predecessors adopted and began to use said color, and barrels and kegs of said shape, design, size and appearance, and barrels and kegs of said color, shape, size, design and appearance, have since continued to be, and are now, in such general use.

34.

Respondents admit that the plaintiff's product as dispensed to the public, is a refreshing beverage, and has been, and is, extensively advertised by plaintiff at an enormous expense, and that it is well known throughout the United States, but whether or not it is favorably known, respondents do not know, and therefore deny said allegation. Respondents suppose the name "Coca-Cola," as the name thereof, has for some time possessed, and now has, considerable value. They deny said product is a meritorious and valuable article of merchandise.

35.

Respondents deny that the name "Coca-Cola," or the style of lettering used therefor, or the color, appearance or characteristics of said syrup, or the barrels and kegs in which the same is contained, or the color thereof, or the dispensing bottles, decanters or labels above referred to, or the bottles **[61]** and labels containing said aerated beverage made from plaintiff's said syrup and put up in bottles with such labels by, or under authority of, plaintiff, each by itself, or all in combination, identify or distinguish plaintiff's said product from the similar products of others, or point exclusively to the plaintiff as the origin thereof.

36.

Respondents admit that plaintiff also uses said name "Coca-Cola" on its stationery, letter-heads, envelopes, circulars and price-lists, but deny that it is so used in any particular or distinctive style or colors. Plaintiff so uses said name sometimes in

block letters, and sometimes in script, and in various different styles, and sometimes in red, sometimes in black, sometimes in white, and in various different colors.

37.

Respondents admit that the defendant Koke Company of America is an Arizona Corporation, and was organized about September 15th, 1911, and thereafter proceeded at the City of St. Louis, Missouri, through its agents to manufacture an extract similar in color and appearance to plaintiff's "Coca-Cola" syrup and placed the same in barrels colored red.

38.

Respondents admit that the defendant, Koke Company of America, ships from St. Louis, Missouri, and the Southern Koke Company, Ltd., and the Koke Company of Texas, procure from it, **[62]** from St. Louis, Missouri, said extract, which is of substantially the same color and appearance as plaintiff's said extract and syrup, and that said extract is both by the Koke Company of America, and by the other defendants, Koke Company of Texas, and Southern Koke Company, Ltd., placed in barrels colored red. Respondents deny that the Koke Company of Oklahoma or the Koke Company of Arkansas, is doing any business whatever, and they deny that they are handling said extract, syrup or aerated beverage, known as "Koke," or dealing therein in any way, or performing any of the acts alleged in the bill. Said corporations were never organized after their charters were granted, and have never

transacted any business, and are not now legally in existence.

39.

The color of said extract, syrup and beverage, as made by the Koke Company of America, and the defendants herein, is not unnecessary or arbitrary, but the coloring matter used therein is an indispensable ingredient thereof, and has a pleasant acid taste, and gives a distinctive pleasing flavor to said extract, syrup and beverage. Said color fortifies the natural color of the other ingredients of said product, which, of themselves, are not sufficient to give an appetizing color to the same.

40.

Respondents do not know whether or not their said product is different from, or inferior to plaintiff's said product, [63] because they do not know precisely all the ingredients plaintiff now uses in said product, or the grade or quality thereof, and therefore deny and demand strict proof of this allegation.

41.

Respondents admit that their extract and syrup are, both by the Koke Company of America, and the other two defendants aforesaid, placed in barrels painted red, but they deny that their said barrels are purposely and deliberately so colored in imitation of plaintiff's said colored barrels. On the contrary, respondents and their predecessors have continuously, from the beginning, during the last twenty-eight years, painted red the kegs and barrels in which their said product was placed, and substantially the same shade of red as their said kegs

and barrels are now painted. The reason why respondents painted their said kegs and barrels said color, is, because they have all the time painted them said color; because Dr. Pemberton, and the predecessors of respondents, originally painted their kegs and barrels that color; because paint of the color which respondents use, and have used all the time, is about the cheapest paint on the market, and can be readily and cheaply mixed; and because it is the most suitable color for barrels and kegs, containing respondents' extracts, syrup or beverage. White would not be satisfactory because it would easily soil; green has a poisonous appearance; and yellow is sickening. Said kegs and barrels are placed by retail dealers and dispensers in the dark basements of their establishments, and, if they were painted any dark color, they could not be readily seen in the dark; hence, any dark color would be unsatisfactory and unsuitable, and would be objected to by [64] retail dealers and dispensers. The delicate shades of the lighter colors are more expensive than the cardinal colors, and so, on the whole, respondents have found the color they use, and have been using all the time, the most satisfactory, appropriate and desirable in every way. Besides, there is a natural abundance of the red mineral with which respondents' paint is made, and this mineral, when mixed with linseed oil, gives a paint cheaply and most suited to the kegs and barrels containing respondents' product. The paint used by the plaintiff on its said barrels and kegs contains a great deal of varnish, and when exposed to the weather, turns a milkish pink color, whereas respondents' paint is

mixed with linseed oil, and, when so exposed, retains the original bright red color.

42.

Respondents admit that their said extract is designated by said Koke Company of America, and by the defendants herein, Southern Koke Company, Ltd., and Koke Company of Texas, as "Koke," and is sold and distributed under said name by said defendants. They deny that said name is a fraudulent and deliberate imitation of plaintiff's said trademark name "Coca-Cola," is used by the plaintiff. Their said trademark name "Koke" is not only not an imitation of the name "Coca-Cola," but is nothing like the same. It is readily distinguishable therefrom in sound, appearance and suggestion, and is not a reproduction, counterfeit, copy or colorable imitation thereof. [65] in any respect. If, however, it should be held that the similarity between said names "Koke" and "Coca-Cola," is so close as to be likely to cause confusion or deception in the minds of the public, or to deceive purchasers, then, respondents charge that they, and their predecessors, adopted and used the name "Koke," and applied it to their said product, before, and at the time when, plaintiff and its predecessors adopted said name "Coco-Cola," and applied it to plaintiff's said product, and that respondents and their predecessors have since continuously so used and applied said name, and are now so using and applying it; and the plaintiff has no right, as against these defendants, to the exclusive use of the name "Coca-Cola."

43.

Respondents admit that the Koke Company of America, sells and ships from St. Louis, Missouri, the extract aforesaid, under the name of "Koke," in the barrels aforesaid which said extract is, by the defendants, used as a basis for making a syrup for sale of soda-fountains and to bottlers, from which syrup an aerated beverage can be, and is, made, and that said syrup resembles the "Coca-Cola" syrup made by plaintiff, in color, taste and appearance. Respondents admit that said syrup so made from said extract by defendants herein, is called and styled by them, "Koke" and "Koke Syrup," and is so known and sold in the market. Respondents do not know whether or not their said barrels are of the same size, shape, design and appearance as the barrels used by the plaintiff, but demand strict proof of that allegation. They do know, however, that [66] the barrels so used by them are of the standard sizes, shapes, designs and appearance, and are of the sizes, shapes, designs and appearance which are now, and for many years have been, in general use by the manufacturers of, and dealers in, similar products; and that respondents and their predecessors used barrels and kegs of substantially the same size, shape, design and appearance as they are now using, before, and at the time when, plaintiff and its predecessors began to use barrels and kegs of the size, shape, design and appearance as plaintiff is now using, and have since continuously used the same, and are now using them.

44.

Respondents deny that their said product "Koke" and "Koke Syrup" is put up in decanters. They admit, however, that their said product is put up in dispensing bottles, and plainly marked with the word "Koke," and that in some instances such dispensing bottles so used by the defendants may be similar in shape, size, color and design, to those used by the plaintiff for "Coco-Cola" syrup. However, dispensing bottles of said same size, shape, color and design are now in general use, as aforesaid, and were in such general use before, and at the time when, plaintiff and its predecessors began to use them. The soda-fountains where these dispensing bottles are used desire the dispensing bottles containing the various beverages which said fountains dispense to the public to be of uniform size, shape, color and design, so they will form an attractive setting to the soda-fountains and not offend the eyes of their [67] customers with odd sizes, shapes and designs, and glaringly dissimilar colors. Respondents admit that their said dispensing bottles, in which their said "Koke" or "Koke" syrup is put up, are plainly marked with the word "Koke," but they deny that said word "Koke" is similar in style to the words "Coca-Cola" as used by plaintiff upon its said dispensing bottles.

45.

Respondents deny that their said trademark name "Koke" as used by them upon their labels, and receptacles containing their said products, is similar to the style of script in which the words "Coca-

Cola" are likewise used by plaintiff. The words "Coca-Cola" as used by the plaintiff, are written in a flowing hand, slanting to the right, and the extensions of the capital "C" in the word "Coca" and of the capital "C" in the word "Cola" both extend to the right, and the letters in which said words are written are shaded heavily on one side and lightly on the other; whereas the word "Koke," used by respondents, as aforesaid, is written in larger, thicker and heavier letters, without any shading, and is written in a backhand, slanting to the left, with the extension of the capital "K" extending to the right, under said word, and the extension of the small "e" curling back over the top of said word. There are various other distinctions between the style and script in which said words are written, which are readily distinguishable and discernable at a glance. The style and script in which said words are written are so unlike, and the general appearance of said words, as written is so dissimilar, that no one could [68] possibly be deceived thereby, or mistake the one for the other.

46.

Respondents deny that the color, shape, size, design or appearance of the bottles in which the respondents' aerated product is bottled and sold by and under the authority of respondents, is similar to the size, shape, design, color or appearance of the bottles in which plaintiff's said aerated product is so bottled and sold. The dissimilarity between the plaintiff's and the respondents' bottles is so glaring that no one could be deceived thereby, or mistake

those of the one for those of the other. Bottles of the same size, color, shape, design and appearance as those which respondents are now using were in general use by various other manufacturers of, and dealers in, similar products, in the bottling of their said products, at the time respondents and their predecessors began to use bottles of said description, and since continuously have been, and are now, in such general use. The respondents' aerated product is not put up in bottles of any uniform size, shape, color, design or appearance, but is put up in bottles of various colors, shapes, sizes, designs and appearance. The various bottlers throughout the country who put up and bottle respondents' aerated product use bottles of different sizes, colors, designs, shapes and appearance according to their fancy, just as do the various bottlers throughout the country who put up and bottle the plaintiff's said aerated product. [69]

47.

Respondents admit that the shape and size of the labels and crowns used by them upon the bottles containing their said aerated product, and furnished by them to the various bottlers and dispensers of said product, are the same as to size and shape as the labels and crowns so used and furnished by the plaintiff, but the size and shape of said labels and crowns were in general use in the same manner as they are now used by plaintiff and respondents, by the manufacturers of, and dealers in, various other similar products, before, and at the time when, plaintiff and its predecessors first adopted and began to use labels

and crowns of said size and shape, and since continuously have been in such general use, and are now in such general use. Neither the size nor the shape of said labels or crowns identifies or distinguishes the plaintiff's product from similar products of others, or points exclusively to the plaintiff as the origin thereof. Respondents use the size of labels and crowns which they are now using because said size is the most appropriate and suitable to the size and character of bottles in which their said product is put up. Respondents use and furnish to their bottlers and dispensers labels of said diamond shape, because they can be more neatly, more readily, and more cheaply fastened to the bottles containing respondent's said aerated product than can be labels of any other shape. Respondents deny that the color, design or general appearance of their said labels is similar to the color, design and general appearance of plaintiff's labels. On the [70] other hand, respondents' said labels are so glaringly dissimilar to, and so readily distinguishable from, the plaintiff's labels, that no one could possibly be deceived thereby, or mistake the one for the other. While it is true that the caps or crowns of the bottles containing respondents' said aerated product are of a gray or silver color, with a red border, and the word "Koke" printed thereon in respondents' characteristic way and style of printing said work, nevertheless, the general appearance of said caps or crowns is so unlike those used on bottles containing plaintiff's said aerated product that no one could possibly mistake the one for the other, or be deceived

thereby. Besides, caps or crowns of said same colors and design were in general use upon bottles containing similar products of others before, and at the time, when, plaintiff and its predecessors first adopted and began to use caps or crowns of said colors and design, and since continuously have been, and are now, in such general use. Respondents deny that either the color, shape, size, design or appearance of the labels and caps or crown used by plaintiff or all combined, identify or distinguish plaintiff's product from similar products of others, or point exclusively to the plaintiff as the origin thereof.

48.

Respondents deny that their said products, "Koke" and "Koke" syrup, are, by the defendants or their vendees, sold, substituted or palmed off as and for plaintiff's "Coca-Cola" syrup [71] and beverage, or that the defendants, or their dealers, do, as a matter of fact, sell, substitute or palm off respondents' product as and for the product of the plaintiff. And they deny that all or any of them, actively connive at, or participate in, any such fraud, substitution or deception. They deny that the adoption and use by them and their predecessors of their said trademark name "Koke" began many years after the plaintiff's product, under the name "Coca-Cola," became widely and favorably known, or that said word "Koke" was adopted by them, or their predecessors, or by the Koke Company of America, for the purpose only of imitating plaintiff's said alleged trademark name "Coca-Cola," or to take

advantage of the reputation and demand for plaintiff's product, or that the use by the defendants herein of their said trademark name "Koke" was for the same and no other purpose. As hereinbefore stated, the adoption and use of said word "Koke" by the predecessors of defendants, and of the Koke Company of America, began about April 1st, 1888, before the plaintiff began to make its product, and before the plaintiff's product under the name of "Coca-Cola," became widely known, and the adoption and use of said name "Koke" was not for the purpose of imitating the name "Coca-Cola," but for the purpose of giving to the product of defendants and their predecessors an arbitrary and distinctive name, different from, and unlike, the name "Coca-Cola." Respondents deny that they deliberately and intentionally, and without any need or necessity, make their said syrup "Koke" like the "Coca-Cola" syrup of the plaintiff in color, taste and appearance, or that they do so in [72] order to enable them to substitute or palm off their said product as and for the plaintiff's "Coca-Cola" syrup and beverage. They deny that the form in which the said word "Koke" is printed by respondents and applied to their product is in deliberate and distinct imitation of the alleged characteristic or distinctive form of plaintiff's manner of printing its said name "Coca-Cola." Respondents deny that they use and employ the word "Koke" in style like the words "Coca-Cola" are used and employed by the plaintiff upon stationary, circulars, price-lists and small signs supplied to dealers, and advertisers. They admit, how-

ever, that they sometimes use said word in colors similar to the colors in which the words "Coca-Cola" are so used by plaintiff. But, plaintiff does not use said words in the manner aforesaid in any particular, characteristic, distinctive or uniform color, but uses it in various and diversified colors; and the colors in which said words are so used by plaintiff do not identify or distinguish plaintiff's product or point exclusively to the plaintiff as the origin thereof. Respondents deny that the use by them of the name "Koke" is in fact deceiving the public, or is now deceiving the public into the belief that respondents' product is the product of plaintiff; and respondents deny that their said product is being substituted and palmed off on the public by the defendants herein and their vendees as or for plaintiff's said product, or that said alleged passing off and deception are effectuated by the use by defendants of said name "Koke." Respondents deny that their said trademark name "Koke" is a deceptive imitation, either [73] in sound, appearance or suggestion, of plaintiff's alleged trademark name "Coca-Cola," or that it is designed as such, or that any deception is carried on or aided by the fact, or that any deception of the public is accomplished or aided by the character and appearance of the various receptacles in which respondents' product is put up, or by the labels used by respondent upon such receptacles, or by the color or appearance of respondents' said product.

49.

Respondents deny that Exhibit "B" to the original

bill in this cause, is a photograph of any label now used by respondents, or used by them at the time of the filing of the bill in this cause. The Southern Koke Company, Ltd., did use such a label several months ago in a limited territory, for a very short while, but as soon as it noticed the similarity between said label and plaintiff's label, it immediately changed the same, and has not used said label since. Respondents deny that said Exhibit "B," which is a mere photograph in black and white, correctly portrays the difference between the label which respondents are now using and were using at the time of the filing of the bill in this cause, and the labels used by plaintiff because, plaintiff's labels contain the words "Coca-Cola" printed thereon in blue, upon a gray background, and the words "Bottles Under Authority of the Coca-Cola Company, Atlanta, Georgia," and the facsimile signature of "Asa G. Candler, Pt.," appearing thereon, printed in black upon a white background; [74] whereas, respondents' said label contains the word "Koke" printed in red on a bright yellow background, and the words, "Bottled Under Authority of the Southern Koke Company, Ltd., New Orleans," or "Koke Company of Texas, Dallas," printed thereon in light blue on the same yellow background with no facsimile signature of any one on the same. Respondents attach hereto, as Exhibits "H" and "I," respectively, one of plaintiff's said labels, and one of respondents' said labels.

50.

Respondents admit that their said aerated "Koke" labeled as shown by Exhibit "I" hereto, is sold

throughout the City of New Orleans and elsewhere, by and under the authority of the Southern Koke Company, Ltd., and that said product bearing a similar label is sold throughout the city of Dallas, Texas, and elsewhere, by and under the authority of the Koke Company of Texas. The Koke Company of America, does not sell its products in bottles, at all. Respondents deny that their said product is by dealers sold, substituted or palmed off on the public as or for plaintiff's said product, bottled by or under authority of the plaintiff, and they deny that the public is thereby deceived or defrauded. They deny that any such alleged substitution is known to defendants, or intended by them, or effectuated by their said syrup, or the word "Koke," on their labels, or the labels, styles or receptacles used by them, or that any of them is a participant in any such fraudulent scheme of deceiving the public or injuring the plaintiff. [75]

51.

Respondents deny that all, or any of the defendants herein are, or is, engaged, together, in any deliberate scheme or plan to pirate upon the reputation of plaintiff's product "Coca-Cola," or to sell, substitute, or pass off respondent's said product "Koke," either as an extract or as an aerated beverage, as, or for, plaintiff's product "Coca-Cola"; or that any of said defendants is a participant in any such scheme, or jointly engaged therein.

52.

Respondents admit that they state to both the dealers, or dispensers, follow any such instructions, or

said, with their said syrup "Koke," that said syrup is made by substantially the same formula as "Coca-Cola Syrup" was originally made by J. S. Pemberton in Atlanta, Georgia, in 1886, '7 and '8, and that it is made by one who is acquainted therewith, and who was at that time interested in said formula, and these statements respondents stand ready to verify.

J. C. Mayfield was originally, as aforesaid, associated with the said J. S. Pemberton in the manufacture and sale of said Pehmberton's "Coca-Cola Syrup," as hereinbefore stated, in 1888, and at that time became acquainted with said formula, and thoroughly learned to make said product according to the same, and by and under the direction of the said Pemberton, and he was the member of said firm, known as the Pemberton Medicine Company hereinbefore referred to, who actually manufactured and compounded said product for said partnership. Respondents [76] deny that they instruct the bottlers of their said aerated "Koke" syrup, or retail purchasers of said product, or retail dealers buying and selling the same, or dispensers of "Koke" syrup, to sell, substitute or palm off on buyers for use and consumption, asking for and intending to purchase "Coca-Cola" made from the "Coca-Cola" syrup of the plaintiff, respondents' said beverage made from their said "Koke" syrup; and they deny that any such retailers in, and dispensers of, "Koke," supplies as aforethat they have, by reason of the use of the name "Koke," in the form in which respondents use it, or the use of respondents' syrups, labels, signs or recep-

tacles, deceived buyers or users, or that they substitute or palm off respondents' said "Koke" beverage as and for the "Coca-Cola" beverage of plaintiff. On the contrary, respondents and their vendees are engaged in selling respondents' said product "Koke," under the trademark name of "Koke," upon its own merits and attractiveness, and not as the product of any one else, and they instruct their agents and employees and vendees not to attempt to substitute or palm off their said product for that of any one else, and their said agents, employees and vendees carry out their said instructions. Respondents deny that it is the intentional design of defendants manufacturing and distributing their said "Koke" syrup, or any of them, by and through the use and employment of their said trademark name "Koke," or their syrup, or their said receptacles, seals, signs or devices, adopted and employed by them in connection therewith, to enable retail dealers and dispensers who are supplied therewith, thereby, or therewith, to substitute or pass off respondents' [77] beverage made from respondents' said syrup, in response to requests for, or as, the plaintiff's beverage, or that any such substitution or passing off has been, or is, successfully or constantly accomplished by said retail dealers and dispensers, or that purchasers and consumers are thereby deceived and defrauded. Respondents deny that it is the intention or design of said defendants, manufacturing and dispensing their said "Koke" syrup, or of the defendants engaged in aerating and bottling the beverage made therefrom, through or by the use of their said trademark name "Koke," their

said syrup, or the aforesaid receptacles, bottles, caps, seals, labels, signs, or devices, adopted and employed by them as aforesaid to enable retail dealers supplied with their said aerated beverage, put up in said bottles bearing their said trademark name "Koke" thereby to substitute or pass off, in response to inquiries for plaintiff's beverage, or as, or for, plaintiff's said beverage, respondents' said bottles aerated beverage, or that by or through the means aforesaid any such substitution or passing off ever has been done, or is systematically and constantly accomplished by said retail dealers, or that purchasers and consumers are thereby deceived and defrauded. On the contrary, the respondents are engaged in advertising, marketing and selling their said product to the public upon its own merits, and they, and their predecessors, have been so engaged for the past twenty-seven or twenty-eight years. It is true the respondents' predecessors were not as wealthy, and did not have as much capital, as the plaintiff and its predecessors, and for that reason could not advertise [78] their product as extensively as the plaintiff and its predecessors have advertised their said product, but the business of the respondents has grown during all of said time little by little, until it has now reached out and spread throughout the length and breadth of the United States and into foreign countries. As long as respondents and their predecessors were doing a comparatively small business, the plaintiff made no objection to the same, and no attempt to drive them out of business, but now after years of patient toil and effort, when the respondents have caught up with

the plaintiff and now loom up as formidable competitors, the plaintiff has begun to attempt to stamp out their competition, and by every means in its power to drive them out of business. As a matter of fact, respondents charge upon information and belief, the plaintiff's predecessors got hold of respondents' secret formula and process for making their said product by bribing and corrupting the said J. S. Pemberton's wayward son, the said Charlie Pemberton, who had learned his father's formula, and because they had more capital than respondents' predecessors had, they were enabled, by enormously expensive advertising, to push their ill-gotten product to the front, and obscure the efforts and business of respondents' predecessors.

54.

The plaintiff and its predecessors have knowingly acquiesced for more than a quarter of a century in the use by respondents and their predecessors of their said trademark name "Koke," as applied by them to their said product, and respondents [79] charge that such acquiescence in such use of said name for said period constitutes such gross laches on the part of the plaintiff and its predecessors, as to bar the plaintiff now from any relief.

55.

For more than a quarter of a century respondents and their predecessors have spent their time, energy and money in building up their said business, and in establishing a reputation and demand for their said product under their said trademark name of "Koke," and during all of said time, the plaintiff and its pre-

decessors have stood by silently and permitted the respondents and their predecessors to so expend their said time and energy and large sums of money in so building up and establishing said business, and respondents are advised and charge that consequently the plaintiff and its predecessors are now estopped to question the right of respondents to carry on their said business, or to use their said trademark name "Koke." Respondents are advised and charge that by reason of said laches and estoppel aforesaid, said plaintiff is not entitled to the relief prayed for in the bill.

56.

Respondents are advised and charge that the plaintiff comes into court with unclean hands, and that it should be repelled from a court of equity,—that a court of equity will not assist the plaintiff to perpetrate a fraud [80] upon, and a deception of, the public by suppressing or enjoining alleged unfair competition in the perpetration of said fraud and deception. Plaintiff's said alleged trademark name "Coca-Cola" is a descriptive name, and produces the belief in the minds of the public, and in the minds of ordinary purchasers, that plaintiff's said product sold under said name is a beverage, the essentials or characteristic ingredients of which are derived from the Coca-leaf and the Cola nut, and the popularity of plaintiff's said product arises from the belief in the mind of the ordinary purchaser that he is buying a beverage, the essential or characteristic ingredients of which are derived from the Coca-leaf and the Cola nut; whereas, in fact, the said product contains none

of the essentials or characteristic ingredients of the Coca-leaf, and no appreciable quantity of any extract derived from said Coca-leaf, and said product contains very little, if any, of the essential or characteristic ingredients of the Cola nut, and no appreciable quantity of any extract derived from said Cola nut; but the essential or characteristic ingredients of said product, and those which characterize and distinguish it, and give it its color, taste, appearance and stimulating qualities are not derived from the Coca-leaf or the Cola nut, but are derived from a mixture of caramel coloring, sugar, water glycerine, phosphoric acid, lime juice, alcohol, and a large quantity of pure caffeine, derived from tea leaves and coffee beans, and other sources and not from the Cola nut. Said deceptive, fraudulent, misleading and falsely descriptive name "Coca-Cola" is applied by the plaintiff to its said product in selling and distributing [81] it to dealers and dispensers, and to the consuming public, and in the sale of said product in interstate commerce. Said deceptive, fraudulent, misleading and falsely descriptive name "Coca-Cola" is printed by the plaintiff upon labels affixed to the barrels and kegs, bottles, dispensing bottles, decanters, and receptacles containing plaintiff's said product, and is blown in the glass bottles in which said beverage is sold to the public, and is printed upon the caps and crowns of said bottles, and plaintiff's said product is by plaintiff extensively advertised on billboards, signs, cards and devices, in newspapers, periodicals and upon plaintiff's stationery, letterheads, billheads, price-lists, contracts, etc., under said

deceptive, fraudulent, misleading and falsely descriptive name of "Coca-Cola," and plaintiff labels its kegs, barrels and containers with labels bearing thereon pictures of Coca-leaves and Cola nuts, and this is deliberately done by plaintiff with the fraudulent intent and purpose of producing in the minds of the public the belief that the essential or characteristic ingredients of its said product are derived from the Coca-leaf and the Cola nut, and for the purpose and with the design of facilitating the perpetration of said fraud upon the public, and of assisting in carrying out said deception. Plaintiff advertises its said product as being a nonalcoholic beverage, and sells it to the public under labels bearing the false, deceptive, misleading and fraudulent statement and representation that it is a nonalcoholic beverage, when, as a matter of fact, a twenty per cent solution of alcohol is used by the plaintiff in the manufacture of its said product, and its said [82] product is in fact an alcoholic beverage.

57.

Respondents deny that any actionable damage has resulted to the plaintiff by reason of the conduct of respondents' business as aforesaid, or by reason of any of the acts of any of the defendants.

58.

Respondents are advised and charge that no action can be maintained by the plaintiff for any alleged infringement of any rights which may have accrued to the plaintiff or its predecessors, by reason of any registration of any label bearing said name "Coca-Cola," or "Coca-Cola Syrup," in the United States

Patent Office by the said J. S. Pemberton in 1887, or by anyone else; because, such cause of action, if any there be, accrued more than two years before the filing of the bill in this cause.

59.

Respondents deny each and every allegation in said bill not hereinbefore expressly admitted, denied, or explained, and now, having fully answered, pray that the injunction temporary and perpetual, prayed for in the bill may be disallowed, that judgment upon the merits may be rendered in their favor, and that they may be hence dismissed with their reasonable costs. [83]

KOKE COMPANY OF AMERICA,
By J. C. MAYFIELD,
Prest.

RICHARD E. SLOAN,
JAMES WESTERVELT,
Solicitors for Respondents.

SOUTHERN KOKE COMPANY, LTD.,
By J. C. MAYFIELD,
Prest.

_____,

KOKE COMPANY OF TEXAS,
By J. C. MAYFIELD,
Prest.

_____,

KOKE COMPANY OF OKLAHOMA,
By J. C. MAYFIELD,

JESSE M. LITTLETON,
CARLYLE S. LITTLETON.

KOKE COMPANY OF ARKANSAS,
By J. C. MAYFIELD,
One of the Incorporators,
Respondents.

AUGUSTINE B. LITTLETON,
Of Counsel for Defendants, Chattanooga, Tenn.

JAMES WESTERVELT,
Of Counsel With Defendants, Phoenix, Arizona.

(Seal of Koke Co. of America.)
(Seal of Southern Koke Co.)
(Seal of the Koke Co. of Texas.) [84]

United States of America,
Eastern District of Louisiana,
New Orleans Division,
State of Louisiana,
Parish of Orleans.

Comes J. C. Mayfield, who makes oath in due form of law that he is the president, respectively, of the defendant corporations, the Koke Company of America, the Southern Koke Company, Limited, and of The Koke Company of Texas and an Incorporator of The Koke Company of Arkansas; and that as such Presidents and Incorporator, respectively, he is peculiarly cognizant of the facts stated in the answer filed in the proceedings No. ——, of the United States District Court for the District of Arizona, entitled "The Coca-Cola Company v. Koke Company of America, et als."; that the facts stated in said answer are true of his own knowledge, in substance

and in fact, except those stated to be upon information and belief, and as to those he verily believes them to be true and he hereto affixes the seals of said corporations as the president of each (except that of The Koke Company of Arkansas), having first been thereunto lawfully authorized, in further attestation of the truth of their answer.

J. C. MAYFIELD.

Sworn to and subscribed before me this 22d day of May, 1914.

[Notarial Seal] EDW. RIGHTOR,
Notary Public, Appointed for Life.

(Seal of The Koke Co. of Texas.)
(Seal of the Koke Co. of America.)
(Seal of the Southern Koke Co., Ltd.)
(Seal of The Koke Co. of Texas.)
(Seal of the Koke Co. of America.)
(Seal of the Southern Koke Co., Ltd.)

[85]

United States of America,
Eastern District of Tennessee,
Southern Division.
State of Tennessee,
County of Hamilton.

Comes J. C. Mayfield, Jr., who makes oath in due form of law that he was one of the incorporators of the Koke Company of Oklahoma, and that as such incorporator he is acquainted with its affairs, and its history; that the facts stated in the foregoing answer, with reference to said Company are true in substance and in fact, and he makes this verification as an incorporator of said Company in its behalf.

J. C. MAYFIELD, Jr.

Sworn to and subscribed before me this 19th day of May, 1914.

[Notarial Seal] C. S. COFFEY,
Notary Public.

My commission began on the 25th day of Jany., 1911, and expires on the 25th day of Jany., 1915.
[86]

Plaintiff's Exhibit "A"—Certificate of Registration of Label.

No. 6,752. (2–166)

UNITED STATES OF AMERICA,
Patent Office.

Here appears five documentary 2-cent stamps—across face of each is written 1898 MB.

To wit: Be it remembered, That on the tenth day of November, anno Domini 1898, W. L. Bitting, of Sherman, Texas, deposited in this Office for registration a LABEL, of which the following is the title:

"KOKE"

(For a Chemical Compound)

the right whereof he claims as Sole proprietor, in conformity with the law of the United States entitled "An Act to amend the law relating to Patents, Trademarks, and Copyrights," approved June 18, 1874.

IN TESTIMONY WHEREOF I have caused the seal of the Commissioner of Patents to be hereunto affixed this twenty-seventh day of December, 1898, and of the Independence of the United States the one hundred and twenty-third. Given under my hand at Washington, D. C.

The foregoing is a copy of the record, and attached hereto is a copy of said LABEL.

[United States Pat. Office Seal.]

C. H. DUELL,
Commissioner of Patents.

(On second page appears:)

. . . . . .

Koke, W. L. Bitting, Druggists,
Sherman, Texas. [87]

Plaintiff's Exhibit "B"—Assignment of Trademark and Certificate of Registration.

2–392.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

RECEIVED AND RECORDED on the 28th day of October, 1913, in Liber W, 93, page 24 of Transfer of Patents.

IN TESTIMONY WHEREOF, I have caused the seal of the Patent Office to be hereunto affixed.

[United States Patent Office Seal.]

THOMAS EWING,
Commissioner of Patents.

ASSIGNMENT OF TRADEMARK, ETC.

WHEREAS I, William L. Bitting, of Sherman, Grayson County, Texas, am the owner of a Label Registration No. 6,752, dated December 27, 1898, entitled "Koke," for use on a chemical compound, and also the owner of a certain trademark known as "Koke" as applied to and used on a certain nonalcoholic beverage, for the registration of which I filed

an application in the United States Patent Office on August 21, 1911, Serial No. 58,310;

AND WHEREAS, Koke Company of America, a corporation duly organized and existing under and by virtue of the laws of Arizona, is desirous of acquiring all of my right, title, and interest in and to the said registered Label No 6,752, and in and to the said trademark "Koke" as applied to [88] a nonalcoholic beverage, and in and to the said application for the registration thereof, Serial No. 58,310, filed August 21, 1911, and in and to the goodwill of the business of manufacturing and selling said chemical compound, and said nonalcoholic beverage;

NOW, THEREFORE, To all whom it may concern, be it known that, for and in consideration of the Sum of Five Hundred Dollars, lawful money, the receipt whereof is hereby acknowledged, and for other valuable consideration, I, the said William L. Bitting, have sold and assigned, and by these presents do sell and assign to and unto the said Koke Company of America, its successors and assigns, all and several my right, title, and interest in and to the said Label Registration No. 6,752, dated December 27, 1898, entitled "Koke" and used on a chemical compound and all of my right, title, and interest in and to the said trademark "Koke" as applied to a nonalcoholic beverage, and in and said trademark application, Serial No. 58,310, filed August 21, 1911, for the registration of the same, and in and to the goodwill of the business of manufacturing and selling chemical compounds and said nonalcoholic beverage under the said trademark "Koke."

And the Commissioner of Patents is hereby authorized and requested to register the said trademark "Koke" to the aforesaid Koke Company of America its successors and assigns.

Signed at Sherman, Grayson County, Texas, this 19th day of May, 1913. [89]

WILLIAM L. BITTING.

State of Texas,
County of Grayson.—ss.

On this 21st day of October, 1913, before me, R. L. Brome, a notary public in and for the County of Grayson and State of Texas, came the above-named William L. Bitting, with whom I am personally acquainted, and personally known to me to be the person he represents himself to be, and being by me duly sworn, deposes and says that he signed, personally, the foregoing instrument, for the purposes therein set forth.

[Notary Seal] T. L. BROME,
Notary Public.

My commission expires June 1, 1915. [90]

Plaintiff's Exhibit "C"—Certificate of Registration of Trademark.

2–394.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To All Persons to Whom These Presents Shall Come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this office of the Cer-

tificate of Registration, Statement, Declaration and Drawing in the matter of the

Trademark
Registered by
William L. Bitting, Assignor to
Koke Company of America,
January 13, 1914, Number 94,869,
for a
Nonalcoholic Fruit-Flavored Beverage of Certain Named Ingredients.

The certificate of registration was granted for the term of twenty years, and so far as is disclosed by the records of this office, said certificate still in full force and effect.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 1st day of May, in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the United States of America the one hundred and thirty-eighth.

[Seal of U. S. Pat. Office.]

THOMAS EWING,
Commissioner of Patents. [91]

2-372

No. 94,869.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come:

This is to certify that by the records of the United

States Patent Office it appears that William L. Bitting,

of

Sherman, Texas,

did, on the 21st day of August, 1911, duly file in said Office an application for REGISTRATION of a certain

TRADEMARK

for a nonalcoholic fruit-flavored beverage of certain named ingredients.

He having assigned his right, title, and interest in said Trademark to Koke Company of America, a corporation of Arizona, that he duly filed therewith a drawing of the said TRADEMARK a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the COMMISSIONER OF PATENTS.

And, upon due examination thereof, it appearing that the said applicant is entitled to registration of his said TRADEMARK has been duly REGISTERED to Koke Company of America, its successors or assigns, in the UNITED STATES PATENT OFFICE, this thirteenth day of January, 1914.

This certificate shall remain in force for TWENTY YEARS, unless sooner terminated by law. [92]

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed, at the city of Washington,

this thirteenth day of January, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal] J. T. NEWTON,
Acting Commissioner of Patents.

6-530.

UNITED STATES PATENT OFFICE.

William L. Bitting, of Sherman, Texas, Assignor to Koke Company of America, a corporation of Arizona.

Trademark for a nonalcoholic fruit-flavored beverage of certain named ingredients.

94,869. Registered Jan. 13, 1914.

Application filed August 21, 1911, Serial No. 58,310.

STATEMENT.

To All Whom it may Concern:

Be it known that I, William L. Bitting, a citizen of the United States of America, residing at Sherman, county of Grayson, State of Texas, and doing business at East Side Square, in said city, have adopted and used the trademark shown in the accompanying drawing, for a nonalcoholic beverage, consisting of a rock-candy syrup, caramel-colored, and having a [93] fruit flavoring, in Class No. 45, beverages, nonalcoholic.

The trademark has been continuously used in my business since November 10, 1898.

The trademark is applied or affixed to the goods, or to the bottles or packages containing the same, by

placing thereon a printed label on which the trademark is shown.

WILLIAM L. BITTING.

KOKE

DECLARATION.

State of Texas,
County of Grayson,--ss.

William L. Bitting, being duly sworn, deposes and says that he is the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes himself to be the owner of the trademark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trademark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trademark is used by him in commerce among the several States of the United States; that the drawing and description presented truly represent the trademark sought to be registered; and that the specimens show the trademark as actually used upon the goods.

WILLIAM L. BITTING.

Subscribed and sworn to before me this the 29th day of July, 1911.

[L. S.] T. L. BROME,
Notary Public. [94]

Plaintiff's Exhibit "D"—Certificate of Registration of Trademark.

No. 55,878.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come:

This is to certify that by the records of the United State Patent Office it appears that Murfreesboro Bottling Works of Murfreesboro, Tennessee, a corporation organized under the laws of the State of Tennessee, did, on the 10th day of April, 1905, duly file in said Office an application for REGISTRATION of a certain

TRADEMARK

for Beverages Made from Coca Leaves, that it duly filed therewith a drawing of the said Trademark, a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribe by the COMMISSIONER OF PATENTS.

And, upon due examination thereof, it appearing that the said applicant is entitled to registration of its said TRADEMARK under the law, the said TRADEMARK has been duly registered to Murfreesboro Bottling Works and its successors or assigns, in the UNITED STATES PATENT OFFICE, this 21st day of August, 1906.

This certificate shall remain in force for Twenty Years, unless sooner terminated by law.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed, at the city of Washington, this twenty-first **[95]** day of August in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

[United States Patent Office Seal.]

E. B. MOORE,
Acting Commissioner of Patents.

TRADEMARK.

No. 55,878. Registered Aug. 21, 1905.

Murfreesboro Bottling Works.

Beverages Made from Coca Leaves.

Application filed Apr. 10, 1905.

KOKE.

Proprietor,
MURFREESBORO BOTTLING WORKS,
By MUNN & CO.,
Attorneys.

Witnesses:
JOS. A. RYAN,
AMOS W. HART.

UNITED STATES PATENT OFFICE.

Murfreesboro Bottling Works, of Murfreesboro, Tennessee. Trademark for beverages made from Coca-leaves.

No. 55,878. Registered Aug. 21, 1906.

Statement and Declaration.

Application filed April 10, 1905, Serial No. 1,044.

STATEMENT.

To All Whom It may Concern: [96]

Be it known that the Murfreesboro Bottling Works, a corporation duly organized under the laws of the State of Tennessee, and located in the city of Murfreesboro, county of Rutherford, in said State, and doing business at No. 630 Water Street, in said city of Murfreesboro, had adopted for its use the trademark shown in the accompanying drawing.

The trademark has been continuously used in the business of said corporation, since May 1, 1902.

The class of merchandise to which the trademark is appropriated is Class 45, Beverages, nonalcoholic, and the particular description of goods comprised in said class upon which said trademark is used is beverages made from coca-leaves.

The trademark is usually displayed on the package containing the goods by placing thereon a printed label on which the same is shown.

MURFREESBORO BOTTLING WORKS,
By J. W. HUGGINS,
Secty.

DECLARATION.

State of Tennessee,
County of Rutherford.

J. W. Huggins, being duly sworn, deposes and says that he is the secretary of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement true; that he believes said corporation is the owner of the trademark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-

mark, either in the **[97]** identical form or in any such near resemblance thereto as might be calculated to deceive; that said trademark is used by said corporation in commerce among the several States of the United States, and particularly between the States of Tennessee, Alabama and Georgia, and between the United States and foreign nations or Indian tribes and particularly with Europe and Germany; and that the description, drawing, and specimens presented truly represent the trademark sought to be registered.

J. W. HUGGINS.

Subscribed and sworn to before me, a notary public, this eighth day of April, 1905.

[L. S.] J. H. CRICHLOW,
Notary Public. **[98]**

Plaintiff's Exhibit "E"—Assignment of Trademark, etc.

2—392.

DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE.

Received and Recorded on the 12th day of December, 1911, in Liber M. 88, page 406 of Transfers of Patents.

IN TESTIMONY WHEREOF, I have caused the seal of the Patent office to be hereunto affixed.

[Seal of U. S. Pat. Office.]

6–1697.

E. B. MOORE,
Commissioner of Patents.

ASSIGNMENT OF TRADEMARK, etc.,

Whereas Murfreesboro Bottling Works, of Murfreesboro, Tennessee, a corporation, was the owner

of a Trademark known as "Koke" as applied to and used on tonic beverages and registered the same in the United States Patent Office on or about August 21, 1906, said registration being numbered 55,878; and

Whereas Murfreesboro Bottling Works, a corporation, was owned and operated by S. B. Christy, C. B. Huggins, and Christy & Huggins Co., composed of S. B. Christy, C. B. Huggins, and J. W. Huggins, all of Murfreesboro, Tennessee, who, subsequent to the registration of said Trademark "Koke" in the United States Patent Office, converted said corporation into [99] a firm composed of S. B. Christy, C. B. Huggins, and J. H. Huggins, and Christy & Huggins Co., composed of the said S. B. Christy, C. B. Huggins, and J. W. Huggins, who thereupon continued the business of said Murfreesboro Bottling Works, a corporation, under the firm name and style of Murfreesboro Bottling Works; and

Whereas Koke Company of America, a corporation duly organized and existing under and by virtue of the laws of Arizona, is desirous of acquiring all of the right, title, and interest of said S. B. Christy, C. B. Huggins, and J. W. Huggins, and of the firm of Christy & Huggins Co., aforesaid, trading under the name and style of Murfreesboro Bottling Works, in and to the said Trademark "Koke," as applied to and used on beverages, the United States Trademark registration No. 55,878 therefor, and in and to the goodwill of the business of manufacturing beverages; and

Whereas said S. B. Christy, C. B. Huggins, and J. W. Huggins, and the said firm of Christy & Huggins Co., aforesaid, are willing that said Koke Company of America shall acquire, own, and enjoy all of said interests as aforementioned:

NOW, THEREFORE, BE IT KNOWN that for and in consideration of the sum of Five Hundred Dollars, lawful money, the receipt whereof is hereby acknowledged, and for other valuable consideration, the said S. B. Christy, C. B. Huggins and J. W. Huggins, and the firm of Christy & Huggins Co., have sold, set over and assigned, and by these presents do sell, set over and assign to and unto the said Koke Company of **[100]** America, its successors and assigns, all and several their right, title and interest in and to the said Trademark "Koke," as applied to and used on beverages, and in and to the United States Trademark registeration No. 55,878, registered August 21, 1906, and in and to the goodwill of the business of manufacturing and selling beverages.

Signed at Murfreesboro, Tennessee, this 28th day of November, 1911.

S. B. CHRISTY,
C. B. HUGGINS,
J. W. HUGGINS,
CHRISTY & HUGGINS CO.,
By J. W. HUGGINS,
Trading Under the Firm Name and Style of Mulfreesboro Bottling Works.

State of Tennessee,
County of Rutherford,—ss.

On this 28th day of November, 1911, before me, James D. Richardson, a Notary Public in and for the County of Rutherford, State of Tennessee, came the above-named S. B. Christy, C. B. Huggins, and J. W. Huggins, with whom I am personally acquainted, and personally known to me to be the persons they represent themselves to be, and each of whom, being by me duly sworn, deposes and says that the statements set forth in the foregoing instrument are true, and that each of them signed, personally, the foregoing instrument, and that the signature of Christy & Huggins Co., was affixed with their **[101]** approval and consent, by J. W. Huggins, for the purposes therein set forth.

[Notarial Seal] JAS. D. RICHARDSON, Jr.,
Notary Public.

My com. exp. in Jany. 1, 1915. **[102]**

Plaintiff's Exhibit "F"—Mexican Certificate of Registration of Trademark.

REPUBLICA MEXICANA.

CERTIFICADO DE REGISTRO DE MARCA.

11,688.

La Oficina De Pathentes Y Marcas.

A todos los que el presente Certificado vieren, sabed:

Que The Koke Company Sociedad Anonima, ha—registrado legalente en esta Oficina el dia one de Octobre de mil novecientos once a las once horas

dier mintuos a. m. la marca cuyo facsimile y descripcion van adjuntos.

Este registro es valido por veinte anos a partir de la fecha citada arriba.

Y para que conste se le— extiende el presente Certificado en la ciudad de Mexico, a 14 de Octobre de 1911.

El Director,

(Signed) J. DE LAS FUNELLE.

[Seal: Cfrcan de Patentesy Marcas. Mexico.]

(Second page contains copy of Trademark:)

Trade
KOKE
Mark
M. M. Rgtrda
THE KOKE COMPANY,
Phoenix, Arizona,
U. S. A. **[103]**

A TODOS LOS QUE PUEDA INTERESAR:

Sabed que The Koke Company, una Sociedad Anonima, debidamente organizada bajo las leyes del Estado de Arizona, Estados Unidos de America, y teniendo su Oficina Principal de negocios en la Ciudad de Phoenix, Estado de Arizona, Estados Unidos de America, y habiendo elegido lugar para recibir notificaciones en la Ciudad de Mexico, D. F. Calle de Gante num. 1, despacho del Senor E. Deal Fuller, ha adoptado para su uso propio y exclusivo una marca industrial denominada "Koke," y que sirve para distinguir debidas gaseosas.

La marca que se desca registrar consiste en las letras que vienen a constituir la palabra "Koke,"

formulada en cualquier estilo y tamano. En el liston que se encuentra arriba de dicha palabra y formado por la ultima letra de la misma se ve la palabra "Trade," y en el liston debajo de la referida palabra "Koke" y formada por la primera letra de la misma se ve la palabra "Mark." Debajo de esta palabra se ve la leyenda "Marca Industrial Registrada," u aun mas abajo el nombre y la ubicacion del propietario de la marca, prescriptas por la ley.

Despues de haber asi descrito la marca, me reservo lo siguiente.

RESERVAS.

Esta marca industrial puede ser de caulquier tamano, color o postura, en que se coloque la palabra "Koke," pudiendo esta estar representada por cualquier estilo o forma de letra, sin que por ello se altere el caracter de la citada marca industrial cuyo detalle essencial es la palabra "Koke." **[104]**

En testimonio de lo cual he firmado la anterior descripcion y reserva, como spoderado de The Koke Company en Ciudad de Mexico, D. F. Hoy 11 de Octobre e 1911.

(Signed) E. DEAN FULLER,
Apoderado. **[105]**

Plaintiff's Exhibit "G"—Canadian Certificate of Registration of Trademark.

(First page contains copy of Trademark.)

Trade
KOKE
Mark.

(Canadian seal impressed across face of trademark.)

DOMINION OF CANADA.

We, The Koke Company of America, having our

head office at Phoenix, in the State of Arizona, one of the United States of America, hereby request you to register in the name of The Koke Company of America a Specific Trademark to be used in connection with the sale of a Soda-fountain Beverage which we verily believe is ours on account of having been the first to make use of the same.

We hereby declare that the said Specific Trademark was not in use to our knowledge by any other person than ourselves at the time of our adoption thereof. The said Specific Trademark consists of the word KOKE in scroll form having the word "Trade" printed in small clear type above the word "KOKE" in the scroll or extension of the letter E in the word "KOKE" and the word "Mark" printed in similar type in the extension of the first letter K in the word "KOKE."

A drawing of the said Specific Trademark is hereto annexed.

Signed at Dallas, Texas, U. S. A., this 4th day of March, 1913, in the presence of the two undersigned witnesses. **[106]**

KOKE COMPANY OF AMERICA,
J. C. MAYFIELD,
President.

Witness:
W. McCARTY MOORE.
F. H. STEPHENSON.

To the Minister of Agriculture,

Ottawa.

(Canadian Seal Dept. of Agriculture appears on face of the preceding.)

Dieu et Mon Hoit.

(Canadian Seal Dept. of Agriculture.)

THIS IS TO CERTIFY that this TRADE-MARK (Specific) to be applied to the sale of a Soda-Fountain Beverage, and which consists of the word, "KOKE" in scroll form, having the word "Trade" printed in small clear type above the word "Koke," in the scroll or extension of the letter "E" in the word "Koke" and the word "Mark" printed in similar type in the extension of the first letter "K" in the word "Koke," as per the annexed pattern and application, has been registered in THE TRADE-MARK REGISTER NO. 74, Folio 18223 in accordance with "THE TRADEMARK and DESIGN ACT," by

The Koke Company of America
of the City of Phoenix, State of Arizona,
United States of America.

on the 12th day of April, A. D. 1913.

Department of Agriculture.

(Copyright and Trademark Branch.)

Ottowa, Canada, this 12th day of April, A. D. 1913.

GEO. F. HALLOWAY,

Deputy of the Minister of Agric. [107]

BOTTLED UNDER AUTHORITY OF THE
Coca-Cola
COCA-COLA CO. ATLANTA, GA.
BOTTLED UNDER AUTHORITY OF THE
KOKE
SOUTHERN KOKE CO. LTD
NEW ORLEANS

[108]

[Endorsements]: E.—21 (Phx.) Original. In the District Court of the United States for the District of Arizona. The Coca-Cola Company vs. The Koke Company of America et al. Received copy of the Within Answer. J. E. Morrison. By Chas. L. Marshall. Answer. This 28th day of May, 1914. Filed May 28, 1914. Geo. W. Lewis, Clerk. By R. E. L. Webb, Dep. Sloan & Westervelt, Fleming Building, Phoenix, Arizona, Solicitors for Defendants. **[109]**

In the District Court of the United States for the District of Arizona.

No. E.-21—IN EQUITY.

THE COCA-COLA COMPANY

vs.

KOKE COMPANY OF AMERICA, SOUTHERN KOKE COMPANY, LTD., KOKE COMPANY OF TEXAS, KOKE COMPANY OF ARKANSAS, KOKE COMPANY OF OKLAHOMA.

Order Extending Time for Taking Evidence.

In this cause, by agreement of counsel for the complaint and the defendants, it is ordered by the Court:

1. That the time for taking testimony be extended so as to allow the complainant sixty days from the first day of July, 1914, in which to take its evidence in chief, and so as to allow the defendants sixty days from the expiration of the time thus allowed the complainant in which to take its evidence,

and so as to allow the complainant thirty days from the expiration of the defendants' time, as aforesaid, in which to take its rebuttal evidence.

2. That the evidence of any of the witnesses for any of the parties may be taken by depositions, at any place desired by the party calling the witness, within the time aforesaid, before any disinterested notary public, upon giving the opposing counsel five days' notice in writing of the time when, and the place where, said depositions are to be taken, and the names of the witnesses whose depositions are to be taken.

3. That the evidence, when taken by depositions, shall be taken down in shorthand and written out on a typewriter by any competent, disinterested stenographer, and the witnesses shall sign and swear to their depositions, and the notary public shall affix [110] his seal to his jurat in each instance.

4. That such depositions as may be taken in the case of the Coca-Cola Company vs. Southern Koke Company, Limited, et al., pending in the United States District Court for the Eastern District of Louisiana, New Orleans Division, at New Orleans, Louisiana, or copies thereof when properly signed and sworn to by the witnesses taken within the time aforesaid, may be filed in this court and in this cause, and used as evidence on the trial thereof, in so far as the same may be relevant, by any of the parties thereto, subject, however, to exceptions for competency, relevancy and materiality.

5. That all exhibits, upon being properly identified, may be retained by counsel producing and offer-

ing the same, subject to reasonable inspection by opposing counsel.

6. That the right is reserved to all parties to produce witnesses in person in open court and give oral evidence on the trial of this cause, and that a duly certified transcript of any oral evidence that may be given on the trial of the case of The Coca-Cola Company vs. Southern Koke Company, Limited, in the United States District Court at New Orleans, as aforesaid, may be filed in this cause, and used as evidence on the trial thereof, by any of the parties thereto, in so far as the same may be relevant, subject, however, to exceptions for competency, relevancy and materiality.

7. That the right to object, at the trial, to the competency, relevancy and materiality of any evidence offered on the trial of this cause is expressly reserved to all parties.

J. E. MORRISON,
Solicitor for Complainant.

Agreed to:

FRANK F. REED and
E. S. ROGERS,
Attorney for Complainant.
CHANDLER, THOMSON HIRSCH,
General Counsel for Complainant.
SLOAN & WESTERFELT,
Attorney for Defendants.
LITTLETON, LITTLETON & LITTLETON,
General Counsel for Defendants. [111]

[Endorsements]: No. E.-21 (Phx.) U. S. District Court for the District of Arizona. The Coca-

Cola Co., Complainant, vs. Koke Co. of America et al., Defendants. Order Extending Time for Taking Evidence. Filed July 1, 1914. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Law Offices Littleton, Littleton & Littleton, Chattanooga. Tenn. [112]

In the United States District Court, District of Arizona.

No. E.-21 (Phx.).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA, SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,

Defendants.

Order Extending Time for Taking Evidence.

This matter coming on to be heard upon motion of Messrs. Richard E. Sloan and James Westervelt, solicitors for defendant, and it appearing to the Court that the plaintiff has heretofore filed written interrogatories to be answered by the various defendants as therein set forth and that the defendants have filed within the time allowed by Equity Rule No. 58, objections to said interrogatories and to each of them;

NOW, THEREFORE, on motion of Richard E. Sloan, Esq., and of James Westervelt, Esq., solicitors for the defendants, it is ordered that the time of

defendants to answer the said interrogatories be enlarged and extended until the expiration of fifteen days after the determination and order of this Court upon said objections to said interrogatories.

Dated July 16th, 1914.

WM. H. SAWTELLE,
Judge.

U. S. District Court, District of Arizona. Coca-Cola Company vs. Koke Co. of America et al. Order. Service acknowledged July 9, 1914. J. T. Morrison, Atty. for Plaintiff. Filed Jul. 16, 1914. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Sloan & Westervelt, Fleming Building, Phoenix, Arizona. [113]

In the United States District Court for the District of Arizona.

No. E–21 (Phx.).

THE COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY of AMERICA et al.,
Defendants.

Notice of Motion for Leave to Amend.

To the Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants Herein or Richard E. Sloan, Esq., or James Westervelt Esq. Their Solicitors of Record.

You will please take notice that on the 1st day of September, 1914, at the hour of ten o'clock A. M. or

as soon thereafter as counsel can be heard, the above-named plaintiff at the courtroom of the above-entitled court, in the city of Phoenix, District of Arizona, will move the Court to amend its original bill of complaint in accordance with the attached motion and copy of proposed amendments.

Dated Phoenix, Arizona, August 17th, 1914.

J. F. MORRISON,
Solicitor for Plaintiff. [114]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

Motion for Leave to Amend.

Comes now the above-named plaintiff, and moves the Court that it be granted leave to amend its original bill of complaint in the particulars and manner specified in the attached copy of the proposed amendments.

J. E. MORRISON,
Solicitor for Plaintiff. [115]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

versus

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,

Defendants.

Amendments to Bill of Complaint.

And now comes the plaintiff herein, The Coca-Cola Company, and by leave of the Court heretofore had and obtained, amends its Bill of Complaint herein in the following particulars, viz.:

(1.)

Cancel paragraph (c) on page 2, and substitute therefor the following:

"(c). This suit is also brought upon the ground of the joint and several infringement by the defendants in commerce conducted among the several States, of the United States, and foreign nations of the trademark 'Coca-Cola' of the plaintiff duly registered under the Act of Congress of March 3, 1881, in the United States Patent Office on January 3, 1893, by the plaintiff, and duly registered by the plaintiff in the Patent Office of the United States under and by virtue of the provisions of the Act of Congerss of February 20, 1915, entiled, 'An Act to Authorize the

Registration of Trademarks used in Commerce with foreign nations, among the several States of the United States, and with the Indian Tribes, and to Protect the Same.' Said registration relates to articles of merchandise of the same descriptive properties as the article and merchandise upon which and in connection with which the infringing marks and names used by the defendants are employed."

(2.)

On page 3, cancel the following: [116]

"Said J. S. Pemberton thereupon, after the use of said name 'Coca-Cola' upon said syrup, sold and shipped in commerce between the several States and with foreign nations, did, after application, statement and verification, in due form, register and was granted a certificate of registration of said trademark name 'Coca-Cola' on June 6th, 1887, as a trademark for said syrup under and by virtue of the provisions of the Act of Congress of March 3d, 1881."

(3.)

Insert at the close of paragraph 2 the following:

"That in addition to the trademark name Coca-Cola which is very generally used by purchasers who desire plaintiff's beverage, there are also used and employed certain nicknames by which plaintiff's product is known, asked for and identified by purchasers and consumers thereof. That one of the said nicknames is the word 'Koke' into which plaintiff's trademark name Coca-Cola has been abbreviated by the public, and another of said nicknames is the word 'Dope,' and said words 'Koke' and 'Dope,' and each of them, are now and for many years past have been, and prior to the application

of either of them to any other beverage, recognized and commonly and familiarly used nicknames for Coca-Cola, and the words 'Koke' and 'Dope' and each of them have been for many years commonly and familiarly used nicknames for plaintiff's said beverage, so that a request at a soda-fountain, or wherever beverages are on sale, for 'Koke' or 'Dope' is understood to be a specific and definite request for Coca-Cola, so intended by the purchaser using such word, and so understood by the dealer, and for very many years, and continuously to the present time, and before the application of said words 'Koke' or 'Dope,' or either of them, to any other beverage whatsoever, the said words 'Koke' and 'Dope' indicated, designated and identified, and now indicate, designate and identify exclusively plaintiff's said product, and mean it and nothing [117] else."

(4.)

Insert at the beginning of Paragraph 3 the following:

"(3.) Plaintiff further states that after it had become so vested with and entitled to the sole and exclusive right to the use of the said trademark Coca-Cola, and was the owner thereof as, its trademark, plaintiff did, on the 14th day of May, 1892, duly apply to the United States Patent Office for registration of the said trademark Coca-Cola, and thereupon did make the statement and declaration required by law for such registration, and did show that said trademark had been used by the pla ntiff and its privies in title for a tonic syrup or beverage in com-

merce between the States of the United States, and with foreign nations, and complied in all respects with the Act of Congress of March 3d, 1881, entitled, 'An Act to Authorize the Registration of Trademarks and Protect the Same,' and complied with all the regulations of the Commissioner of Patents in that behalf, and thereupon, on the 31st day of January, 1893, the registration of the said trademark Coca-Cola was duly allowed for nutrient or tonic beverages, and certificate of registration thereof was granted to plaintiff dated January 31st, 1893, which said registration and certificate thereof are still in full force and effect, and wholly unrevoked and uncanceled. A copy of the said certificate of registration is attached hereto, marked Exhibit 'A'– 1."

(5.)

Insert in paragraph 5, between the words "Coca-Cola" and "the original," "the said nicknames therefor, 'Koke' and 'Dope.' "

(6.)

Cancel in paragraph 6 beginning with the following:

"Said extract is designated by said Koke Company of America," etc., down to and including the words, "styled 'Koke' and 'Koke Syrup,' " in said paragraph 6, and in lieu thereof, substitute the following: [118]

"Said extract is designated by said defendant sometimes as 'Koke' and sometimes as 'Dope,' and is sold and distributed under said names by it, which said name 'Koke' is a common and familiar abbreviation of plaintiff's trademark name Coca-Cola, and it

and the said name 'Dope' each are a commonly and familiarly known and recognized nickname for plaintiff's said product, and mean it and nothing else. That the defendant, Koke Company of America, sells and ships from the City of St. Louis, said imitative extract usually under the said name 'Koke,' and in said imitated barrels, to the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas, each of which is a corporation of the State of Arizona, Southern Koke Company, Limited, operating and doing business in the City of New Orleans, and the Koke Company of Texas operating and doing business in the City of Dallas, Texas. The said extract is by said last-named corporations, used as a basis for making a syrup for sale to soda-fountains and bottlers, from which syrup an aerated beverage can be made, and is made, which said syrup resembles Coca-Cola syrup made by plaintiff, in color, taste and appearance, and which said syrup so made from said extract by the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company or Arkansas, is called and styled, 'Koke' and 'Koke Syrup,' 'Dope' and 'Dope Syrup.'"

(7.)

Cancel paragraph 7 to the words "Exhibit 'B' hereto attached," and substitute therefor the following:

"That the adoption and use by the said defendant, Koke Company of America of the words 'Koke' and 'Dope' began many years after the plaintiff's said

product under the name Coca-Cola, and under the abbreviations and nicknames 'Koke' and 'Dope' had become widely and favorably known, and the said words 'Koke' and 'Dope' were adopted by the said Koke Company of America, and used by it and the defendants herein, for the [119] purpose only of enabling them and dealers who purchased from them, to pass off the said imitative product of the defendants and the beverage made therefrom, as and for Coca-Cola, and for the purpose of taking an unfair and unlawful advantage of the reputation of, and demand for, plaintiff's said product; that defendants deliberately and intentionally, and without any need or necessity, make said syrup by them designated 'Koke' and 'Dope,' like the Coca-Cola syrup of plaintiff, in color, taste and appearance, in order to enable the use and substitution thereof as genuine Coca-Cola syrup, and the beverage made therefrom to be passed off as the genuine Coca-Cola beverage; that the form in which the said word 'Koke' is printed by defendants and applied to the product sold by them, is in deliberate and designed imitation of the characteristic and distinctive form of plaintiff's manner of printing its trademark name Coca-Cola; that the spurious product of the Koke Company of America under the said names 'Koke' and 'Dope' as sold and distributed by defendants herein, has in the past, and is now being substituted, dispensed and palmed off upon the public by the defendants herein, and their vendees, as and for plaintiff's said product; that the use by defendants of the name 'Koke' and 'Dope' has in fact, caused deception of the public, and is now de-

ceiving the public into the belief that the said spurious product is the product of the plaintiff, and that the said passing off and deception are effectuated by the use by said defendants of the words 'Koke' and 'Dope' as applied to the product of the said Koke Company of America, which said names, and each of them, are commonly and familiarly known and recognized nicknames for plaintiff's said product, which fact plaintiff is informed and believes, and states the fact to be, is well known to defendants and each of them, and said words were adopted and used by the said defendants for the purpose of substituting, passing off and deception, and for no other purpose; and to enable dealers and dispensers to substitute and pass off the said spurious product of the [120] Coke Company of America when the plaintiff's product is asked for, either by the name Coca-Cola, or by its recognized, familiarly known and commonly used nicknames, and the said deception and passing off are aided by the fact that said syrup under the names 'Koke' and 'Dope' is placed by said defendants in barrels colored red, in imitation of plaintiff's distinctive barrels, and so furnished both to soda-fountain stands, dispensers, and to bottlers, for manufacture into an aerated beverage, which said aerated beverage when sold, is sold under the name 'Koke' or 'Dope,' and that defendants have applied to aerated products put up under their alleged authority and made from said syrup produced by the Koke Company of America, labels in imitation of plaintiff's distinctive labels, upon the aerated Coca-Cola made by both plaintiff and authorized bottlers from genuine

Coca-Cola syrup, and that the said syrup product of said Koke Company of America so used is unnecessarily and fraudulently colored in imitation of the distinctive color of plaintiff's product. Said defendants also furnish to soda-fountain dispensers, dispensing bottles or decanters in deliberate imitation of plaintiff's distinctive dispensing bottles or decanters."

(8.)

Cancel paragraph 8, and substitute the following:

"(8.) Defendants state to both the bottlers and dispensers of the syrup sold by the said defendants under the names 'Koke' and 'Dope' that said syrup is made under the same syrup formula as Coco-Cola syrup, and by one who is acquainted therewith, and was at one time interested in said formula, all of which statements are false, and known to defendants to be false and said defendants advise and instruct said bottlers of said product designated by them 'Koke' and 'Dope' and retail purchasers of the same, and retail dealers buying and selling the [121] same, and also, dispensers thereof, to sell, substitute and palm off on buyers for use and consumption asking for and intending to purchase the genuine Coca-Cola, either under the trademark name Coca-Cola, or some recognized, commonly used and familiarly known nickname thereof the said beverages made from the syrup of the defendant, and designated by them 'Koke' and 'Dope,' and said retailers and dispensers follow said instructions and do deceive buyers, and users, and substitute and palm off defendant's said product as and for the genuine product of the plaintiff. That it

is the intention and design of the said defendants manufacturing and distributing said imitative and spurious product under the names 'Koke' and 'Dope,' and each of them, by and through the use and employment of said words 'Koke' and 'Dope,' the said spurious and imitative syrup, and the aforesaid simulated receptacles, labels, styles, signs and devices adopted and employed in connection therewith, to enable retail dealers and dispensers who are supplied therewith, to substitute and pass off the spurious beverage made from said spurious syrup, in response to requests for, and as the genuine Coca-Cola beverage, and that such substitution and passing off have been and are successfully and constantly accomplished by such retail dealers and dispensers, and purchasers and consumers are thereby deceived and defrauded. That it is also the intention and design of said defendants manufacturing and dispensing said imitative and spurious syrup, and of said defendant engaged in aerating and bottling the spurious beverage made therefrom, that through and by the use of the said words 'Koke' and 'Dope,' and the said imitative and spurious syrup, and the aforesaid simulated receptacles, bottles, caps, styles, labels and signs, and devices, adopted and employed as aforesaid, to enable retail dealers supplied with said aerated beverage put up in said bottles bearing said names 'Koke' and 'Dope,' and dressed up in the fraudulent and deceptive style aforesaid, thereby to substitute and pass off, in response to inquiries for [122] plaintiff's product, and as and for the plaintiff's product, said

spurious aerated bottled beverage, and that through and by the means aforesaid, said substitution and passing off have been and are systematically and constantly accomplished, by such retail dealers and purchasers, and consumers are thereby deceived and defrauded."

(9.)

Add as a new paragraph the following:

"(9.) The Koke Company of America claims to have secured, or now to own certain alleged registration in the United States Patent Office, of the words 'Koke' and 'Dope,' which said registrations were secured in fraud of plaintiff's rights, and said Koke Company of America, and its emmissaries, including the defendants herein, threaten dealers in Coca-Cola, who dispense and sell Coca-Cola in response to the universally known and commonly used nicknames therefor, 'Koke' and 'Dope,' with prosecution and suit, claiming the words 'Koke' and 'Dope' to be the registered trademarks of The Koke Company of America, and that the sale of any beverage other than the product of the Koke Company of America, on calls for 'Koke' and 'Dope' is an infringement of the alleged rights of The Koke Company of America, and of said alleged registrations, and that the same is a violation of the Federal laws, and threatening prosecution therefor. That the said threats are for the sole purpose of harassing persons selling plaintiff's product, and damaging and embarrassing plaintiff in its business, and that defendants well know and have long known that neither they nor the Koke Company of America, have any rights in the names 'Koke' or 'Dope,' but that the same are well recognized nick-

names of plaintiff's product, universally so understood by the public and recognized by dealers."

(10.)

Amend paragraph 3 of the prayer by canceling to the words "or like the word 'Coca-Cola' of the plaintiff, or the word 'Koke,'" and substituting as follows: [123]

"That said defendants, and each of them, their officers, servants, agents, employees, attorneys, licensees and assigns, and all acting by or under their authority, may be at first during the pendency of this suit, and afterwards perpetually, enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, on any product not being the genuine product of the plaintiff, the word 'Coca-Cola,' or any like word, or the word 'Koke,' or any like word, or the word 'Dope,' or any like word, or any name, or nickname, by which plaintiff's product is commonly known; from claiming or asserting any right in the name 'Koke' or in the name 'Dope,' or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product, Coca-Cola."

[Seal] THE COCA-COLA COMPANY,
By CHAS. H. CANDLER,
Vice-President,
Plaintiff.

FRANK F. REED,
EDWARD S. ROGERS,
CANDLER, THOMSON & HIRSCH,
Attorneys for Plaintiff. [124]

State of Georgia,
County of Fulton,—ss.

Charles H. Candler, being duly sworn, deposes and says that he is Vice-President of The Coca-Cola Company, plaintiff herein; that he has read the above and foregoing Amendments to the Bill of Complaint herein, and knows the contents thereof, and that the same are true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters, he believes them to be true.

CHAS. H. CANDLER.

Sworn to and subscribed before me, this 4th day of August, 1914.

[Seal] W. A. LANDERS,
N. P. Fulton Co., Ga. [125]

Plaintiff's Exhibit "A"–No. 1—Certificate of Registration of Trademark.

2–394.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

To All Persons to whom These Presents Shall Come, GREETING:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this office of the Certificate of Registration, Statement, Declaration and Drawing in the matter of the

Trademark
Registered by
The Coca-Cola Company,
January 31, 1893, Number 22,406,
for
Nutrient or Tonic Beverages.

The certificate of registration was granted for the term of thirty years, and so far as is disclosed by the records of this office, said certificate is still in full force and effect.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 3d day of September, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States of America, the one hundred and thirty-seven.

[Seal] F. A. TENNANT,
Acting Commissioner of Patents.

(Exhibit "A"—#1.) [126]

NO. 22,406.

THE UNITED STATES OF AMERICA.

To All Whom It may Concern:

This is to certify that by the records of the United States Patent Office it appears that The Coca-Cola Company, of Atlanta, Georgia, a corporation organized under the laws of the State of Georgia, did, on the 14th day of May, 1892, deposit in said Office for Registration, facsimiles of a certain

TRADEMARK

for Nutrient or Tonic Beverages.

and the date of the receipt thereof was duly noted and

recorded; that on the 14th day of May, 1892, it deposited therewith a statement, and a written declaration under oath of Asa G. Candler, an officer of said corporation, copies of all of which are hereto annexed; and the said corporation having made the payment of a fee of Twenty-five Dollars, and complied with the regulations in such cases prescribed by the COMMISSIONER OF PATENTS, and in all other respects complied with an Act of Congress approved March 3, 1881, entitled "An Act to authorize the Registration of Trademarks and protect the same," the said facsimiles, statement, and declaration were duly recorded, and the said TRADEMARK has been duly registered in the said PATENT OFFICE this 31 day of January, one thousand eight hundred and ninety-three and protection therefor will remain in force for THIRTY YEARS from said date unless sooner terminated in accordance with Section 5 of said Act.

IN TESTIMONY WHEREOF the seal of the DEPARTMENT OF THE INTERIOR is hereto affixed this thirty-first day of January, eighteen hundred and ninety-three, and of the Independence of the United States, the one hundred and seventeenth.

Given under my hand at Washington, D. C.

[Seal] W. E. SIMONDS,

Commissioner of Patents. [127]

UNITED STATES PATENT OFFICE.

THE COCA COLA COMPANY, OF ATLANTA, GEORGIA.

TRADE-MARK FOR NUTRIENT OR TONIC BEVERAGES.

ATEMENT and DECLARATION of Trade-Mark No. 22,406, registered January 31, 1893.

Application filed May 14, 1892.

STATEMENT.

ll whom it may concern:

Be it known that THE COCA COLA COMANY, a corporation organized under the laws f the State of Georgia, and located in the ty of Atlanta, Fulton county, in the State f Georgia, and doing business in said city of tlanta, has adopted for its use a Trade-Mark or a Tonic, Sirup, or Beverage, of which the llowing is a full, clear, and exact specification.

The said trade-mark of said company consts of the word or words "Coca-Cola." These ords have been generally written as a compound word and in the particular form represented in the accompanying fac-simile, that to say, with the lower portion of the "C" eginning the word "Coca" extended under e entire word, in the form of a dash, and e top of the "C" beginning the word "Cola" tended over the letters following in the form a dash. Upon the dash of the first "C" said rporation generally has the word "Trade-ark." While said corporation prefers to rm the initial "C's" as just described, and so to form the word as a compound word, t the word may be altogether as one word, or separately as two words, and the dashes omitted, without materially altering the character of the said trade-mark, the essential feature of which is the word "COCA-COLA."

This trade-mark was adopted by the privies in title of THE COCA COLA COMPANY, about the 28th day of June, 1887, and has been continuously used by them and the said corporation since that time.

The class of merchandise to which this trade-mark is appropriated is beverages, and the particular goods comprised in such class on which it is used by the said company is nutrient or tonic beverages. It is usually affixed to the goods by either affixing it to the bottles, kegs or barrels containing the same, in the form of a label, or by printing or stamping the same thereon, or by blowing the letters in the bottle itself.

THE COCA COLA COMPANY,
By ASA G. CANDLER,
President.

Witnesses:
JOHN S. CANDLER,
WM. A. HAYGOOD.

DECLARATION.

tate of Georgia, county of Fulton, ss:

ASA G. CANDLER being duly sworn, deposes nd says that he is president of the corporaon, the applicant named in the foregoing atement; that he verily believes that the oregoing statement is true; that the said corration has at this time a right to the use of e trade-mark therein described; that no her person, firm or corporation has the right such use, either in the identical form or in y such near resemblance thereto as might e calculated to deceive; that the trade-mark is used by the said corporation in commerce between the United States and foreign nations and Indian tribes and particularly with Canada, and that the description and fac-similes presented for record truly represent the trade-mark sought to be registered.

ASA G. CANDLER,

Sworn and subscribed to before me, a notary public, this 6th day of May, A. D. 1892.

[L. S.] WM. A. HAYGOOD,
Notary Public, Fulton County, Georgia.

[128] (EXHIBIT A. #1.)

TRADE-MARK.

THE COCA COLA COMPANY.
NUTRIENT OR TONIC BEVERAGES.

No. 22,406. **Registered Jan. 31, 1893.**

Coca-Cola

Witnesses
Geo. E. Fuch.
Robt A Fitzgerald

Proprietor
The Coca Cola Co
per
Lehmann Pattison & Marbut
Attorneys

[Endorsed]: #E—21. In the United States District Court for the District of Arizona. The Coca-Cola Company, Plaintiff, versus The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. (Amendments to Bill.) Service acknowledged this Aug. 17, 1914. Sloan and Westervelt, Solicitors for Defts. Filed Aug. 17, 1914, at —— M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [130]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Monday, October 5, 1914.

IT IS ORDERED that this case be set for hearing on motion to amend the objections to interrogatories on October 26, 1914, at 10 o'clock A. M.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA et al.,

Defendants.

IT IS ORDERED that this case be set for trial on October 26, 1914, at ten o'clock A. M. [131]

In the District Court of the United States for the District of Arizona.

No. ——. EQUITY.

THE COCA-COLA COMPANY.

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE CO., LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, THE KOKE COMPANY OF ARKANSAS.

Affidavit of A. B. Littleton.

United States of America,
District of Arizona,
State of Arizona,
County of Maricopa,—ss.

The affidavit of A. B. Littleton, who, having first been duly sworn, deposes and says:

That he is an attorney at law and resides in Chattanooga, Tennessee; that he is one of the attorneys for the defendants in this cause, and a member of the firm of Littleton, Littleton & Littleton, who are general counsel for the various defendants in the above-styled cause; that he has personally taken charge of, and in connection with the various counsel in the respective cities where suits are pending, conducted the defense of these defendants in all the suits now pending in the various courts of the United States between the Coca-Cola Company, the

plaintiff in the above-styled cause, and the several Koke Companies made [132] defendants in said proceedings; that he is thoroughly familiar with, and knows of his own personal knowledge, all the various steps taken in the various cases to date.

The history of all the cases is as follows:

On or about the 8th day of April 1914, the plaintiff filed a suit in the United States District Court at New Orleans against the Southern Koke Company, Limited, and various other defendants. On or about the 9th day of April, 1914, the same plaintiff filed a similar suit in the United States District Court at Dallas against the Koke Company of Texas and various other defendants. At about the same time it filed a similar suit in the United States District Court at St. Louis against the Koke Company of America, J. H. Van Deusen and J. C. Mayfield, Jr. All these suits were based upon the same ground of complaint, the bill filed in each case being substantially a duplicate of those in each of the other cases. Some time prior thereto the plaintiff had filed a notice of opposition in the United States Patent Office at Washington, opposing the registration of the trademark "Koke" by the Koke Company of America on the ground that the mark "Koke" was an infringement of the plaintiff's alleged trademark "Coca-Cola." Before the defendants answered any of these proceedings, plaintiff filed the above-styled suit in the United States District Court, at Phoenix, Arizona, against all five of the Koke Companies, on or about the 25 day of April, *May,* 1914, the bill being substantially a copy of

those filed in the other cases above referred to.

The answer was filed in the case at Dallas about May 9th, 1914, and the answers in the other cases were filed shortly thereafter. The answer in the above-styled cause was filed on the 28th day of May, 1914. Nothing further was done until **[133]** the time for plaintiff to take its evidence in chief, under the equity rules, had about expired. Mr. Harold Hirsch, of the firm of Candler, Thomson & Hirsch, of Atlanta, Georgia, General Counsel for plaintiff, asked affiant to enter into an agreement extending plaintiff's time for taking its evidence in chief, and providing that the evidence of any of the witnesses might be taken by depositions, and that copies of the depositions taken in one of the cases might be used in all of them. The agreement was signed by affiant's firm, and by Candler, Thomson & Hirsch, and by the respective attorneys of record in the several forums, was approved by the respective Judges, filed and made an order of court in the respective courts. Thereupon, after having given five days' notice, as provided in said order, plaintiff began taking its evidence in chief in Atlanta on July 27th, 1914. Forty-six witnesses were examined in Atlanta, most of whom were examined right from the start upon the question as to whether or not the words "Koke" and "Dope" are nicknames for plaintiff's product. Affiant, who was present at the taking of all the evidence in all the cities where it was taken, duly and properly objected to all such evidence as to said alleged nicknames, because it was irrelevant, immaterial and wholly outside the pleadings. Plaintiff

still continued to take evidence of this character until about noon, or the afternoon of July 29th, when plaintiff's attorneys served affiant with a copy of an amendment to their pleadings in the United States Patent Office, which they said they proposed to file. A copy of said amendment is hereto attached, and made a part of this affidavit, marked Exhibit "A." Plaintiff's attorneys at or about the same time advised affiant that they would also apply for leave to make a similar amendment to the bills in all the other cases, [134] including this one, and that they intended to include in said amendments a charge also covering the word "Dope." A copy of the precise amendments they proposed to make, however, was not served upon the defendants or their attorneys, or upon affiant, until plaintiff had taken practically all its evidence in chief.

Plaintiff then proceeded to take practically all its evidence in chief, except the evidence of certain experts as to the ingredients of plaintiff's product, etc. Plaintiff examined a vast array of witnesses from various parts of the country in Atlanta, Mobile, New Orleans, Dallas and Chicago, as to what they meant and understood, and as to what they thought the public meant and understood, by the words "Dope" and "Koke" when used in asking for soft drinks at soda-fountains, the purpose of the questions being to prove that "Dope" and "Koke" are nicknames for plaintiff's product. All this evidence was taken over the objection of defendants and against their consent. Still plaintiff did not apply for leave to amend its bill in this cause, or in any of the other

causes, and did not present defendants with a copy of the proposed amendments, until practically all its evidence on the questions raised by these amendments had been taken, and until after defendants time for taking evidence had begun to run.

When plaintiff began to introduce said evidence as to said alleged nicknames, affiant and defendants' other attorneys were surprised, as they had prepared the defense along other and different lines to meet the case made by the original bill, and were not prepared to cross-examine the witnesses on this feature. When the case, as to this feature, was sufficiently unfolded to enable affiant and defendants' other attorneys to see the plaintiff's new line of attack, they had neither the time nor the opportunity to prepare for a proper cross-examination of these witnesses, because there was no let-up in the taking of the [135] evidence until it was practically all taken, and affiant and defendants' attorneys were constantly on the road, traveling from city to city taking the evidence, and this occupied their entire time. Neither affiant nor defendants' other attorneys assisting in the cross-examination, had any opportunity to investigate either the law or the facts with reference to these alleged nicknames, or any opportunity to gather material for cross-examination, or to shape their line of defense or their line of cross-examination to meet the new turn of events. During the first several days of the taking of this evidence, affiant merely objected to the evidence as to the alleged nicknames and did not attempt to cross-examine the witnesses on that feature, so that

a number of the plaintiff's nickname witnesses got by without any cross-examination at all on that subject. Later, when plaintiff's attorneys served affiant with a copy of the amendment they proposed to file in the Patent Office, affiant did attempt a very meagre and cautious cross-examination of some of the witnesses on the question as to nicknames, but as he had had no notice prior to leaving home and going on the road that plaintiff would attempt to make out a case upon the nickname theory, and as he had had no opportunity to investigate either the law or the facts as to said alleged nicknames, his cross-examinations were necessarily so meagre and cautious and circumscribed, as to amount, in a great many instances to practically no cross-examination at all.

Affiant therefore states that, in his opinion, the defense in this case will be seriously prejudiced, and an injustice will be done to defendants, if the proposed amendments are permitted to be filed, because, if permitted, they will render all said evidence as to said alleged nicknames competent, and the result will be a practical denial to defendants of the right to cross-examine plaintiff's witnesses on this feature. [136]

The plaintiff's evidence already taken in this case amounts to about three thousand pages of transcript, by far the larger part of which consists of evidence as to said alleged nicknames. In the taking of this evidence the defendants' attorneys went to Atlanta, Mobile, New Orleans, Dallas and Chicago, and while nearly a thousand witnesses were summoned, as shown by the notice to take depositions in this cause,

one hundred and nineteen witnesses were actually put upon the stand from various parts of the country. Copies of this evidence will be filed in the cases at New Orleans, Dallas, Phoenix, St. Louis, and Washington, thus, making in all fifteen thousand pages of transcript. When the records are printed for the various courts of appeals, there will be fifteen thousand pages to be printed, and, at the rate of $1.00 a page this will run the costs up to the prodigious sum of $15,000. And this is merely part of plaintiff's evidence in chief. If the defendants are compelled to repeat the process and to examine the whole body of the people, as the plaintiff did, to discover what they mean and understand by these alleged nicknames, the record will become so voluminous and the costs will become so great that if the defendants were cast in this court they would rather not appeal the case than to pay the cost of printing such a transcript. The defendants had no reason to anticipate the taking of any such vast amount of evidence under the allegations of the original bill, and no such volume of evidence would have been necessary, in affiant's opinion, under the allegations thereof.

The evidence taken in this case shows that all the facts with reference to these alleged nicknames were well known to the plaintiff before, and at the time when, it drafted and filed its original bill in this cause. It shows that plaintiff had some ten or twelve detectives, or "investigators," in the field for [137] a year or more before the filing of the bill in this cause gathering this evidence, and that these

detectives or "investigators" had made daily reports in writing, setting out even the minute details of the evidence. These reports were used in a good many instances by the witnesses, during the taking of the evidence, to refresh their recollections (some of the witnesses actually reading their evidence into the record from these reports), and plaintiff's attorneys used said reports as a guide in examining the witnesses. It seems, therefore, that what the witnesses would testify to as to these alleged nicknames was well known to the plaintiff, and that the evidence which the plaintiff has taken as to these alleged nicknames is exactly what the plaintiff knew it would be at the time it drafted and filed its original bill in this cause.

The evidence already taken, except as to the alleged nicknames, is squarely within the issues presented by the original bill and tends directly to sustain the allegations thereof, and, if it is worthy of belief and is not rebutted, is amply sufficient to warrant the court in granting the relief prayed for in the original bill. The evidence as to the alleged nicknames was entirely outside the issues as they existed when plaintiff's evidence was taken, and as they now exist, and was entirely irrelevant. It was objected to on this ground but that did not phase the plaintiff. Affiant verily believes therefore, that the plaintiff was not surprised by this evidence, and it did not turn out contrary to the plaintiff's expectations; but, on the other hand was exactly what plaintiff knew it would be when it drafted and filed its original bill in this cause.

In view of the facts hereinbefore set forth showing

that the plaintiff at the time of the filing of its original bill of complaint well knew what its evidence as to said alleged nicknames would be, and notwithstanding the allegations of said [138] original bill prepared its case, summoned its witnesses, and took all of its evidence upon that theory before serving defendants with a copy of its proposed amendments; affiant verily believes and states the facts to be that to permit said amendments would be to give to plaintiff an unfair and unconscionable advantage and would seriously prejudice defendants' case in that the plaintiff having misled defendants as to the issues to be tried, counsel for the latter was unprepared to cross-examine plaintiff's said witnesses and had no opportunity during the taking of said testimony of preparing for such cross-examination and therefore such cross-examination as counsel was able to make of plaintiff's said witnesses was necessarily of such haphazard and superficial character as to amount to practically none at all.

Affiant respectfully submits therefore that in all fairness the plaintiff ought not to be allowed to change the issues raised by its pleadings at this stage of the case, and that in the exercise of a sound judicial discretion leave to amend the bill of complaint should not be granted to plaintiff.

A. B. LITTLETON.

Subscribed and sworn to before me this 13th day of January, 1915.

[Seal]

GEO. W. LEWIS,
Clerk.
By R. E. L. Webb,
Deputy. [139]

Plaintiff's Exhibit "A" Attached to Affidavit of A. B. Littleton—Amendments to Pleading in United States Patent Office.

In the United States Patent Office.

THE COCA-COLA COMPANY

vs.

THE KOKE COMPANY OF AMERICA.

Opposition No. 1424.

Before the Examiner of Interferences.

AMENDMENTS.

The Coca-Cola Company, by leave duly had and obtained, amends its notice of opposition herein in the following particulars:

(1)

Page 2, line 6, by cancelling the words, "but that" after the name "Joseph Jacobs," and inserting the following: "and the said Walker, Candler & Co." and so that the said sentence as amended will read: "And the said Walker, Candler & Co., and the said Dozier and the said W. Walker in his individual capacity," etc.

(2)

By inserting at the close of paragraph 5, on page 4, the following: "That in addition to the trademark name Coca-Cola which is very generally used by purchasers who desire opposer's beverage, there are also used and employed by the public but never by opposer or any of its predecessors, certain nicknames by which opposer's products are known, asked for and [140] identified by purchasers and consumers

thereof, and that one of the said nicknames is the word "Koke" into which opposer's trademark Coca-Cola has been abbreviated by the public, and which said word "Koke" is now, and for many years has been, and prior to any use thereof by applicant, a recognized and commonly and familiarly used nickname for Coca-Cola, and the word "Koke" has been for many years commonly and familiarly known and accepted as a nickname for opposer's said beverage, so that a request at a soda-fountain, or wherever beverages are on sale, for "Koke" is understood to be a specific and definite request for Coca-Cola, so intended by the purchaser using such word, and so understood by the dealer, and for very many years, and continuously to the present time, the word "Koke" indicates, designates and identifies exclusively opposer's product, and means it and nothing else."

(3)

By inserting the after word "Coca-Cola" where it appears in line 11, page 5, the following: "and the abbreviation and nickname "Koke." By inserting in line 13, page 5, after the words, "Trade name," the words "abbreviation thereof and nickname."

(4)

By canceling in lines 24, 25 and 26, on page 5, after the word "Koke," the following: "which said name is a deceptive imitation in sound, appearance and suggestion of opposer's said trademark name Coca-Cola," and by inserting in lieu thereof the following: "which said name is a common and familiar abbreviation of opposer's trademark name Coca-Cola, and

a commonly and familiarly known and recognized nickname for opposer's said product, and means it and nothing else, which, opposer is [141] informed and believes and states the fact to be, is well known to applicant."

THE COCA-COLA COMPANY,
By CHARLES H. CANDLER,
Vice-President.

FRANK F. REED,
EDWARD S. ROGERS,
FRANCIS M. PHELPS,
HAROLD HIRSCH,
Attorneys for Opposer. [142]

[Endorsed]: In the District Court of the United States, District of Arizona. The Coca-Cola Company, Complnt., vs. The Koke Company of America et al., Defts. Affidavit. Filed Jan. 13, 1915. George W. Lewis, Clerk. [143]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

Minute Entry Appearing Under Date of Saturday, January 23, 1915.

Come now the defendants by Messrs. Sloan & Westervelt, Esquires, and the plaintiff by J. E. Morrison, Esquire, and the motion of the plaintiff for

leave to amend its bill of complaint on file herein and the objections of the defendants to certain interrogatories which are on file herein are argued by counsel and submitted to the Court for its decision and judgment thereon, and the same is taken under advisement by the Court. **[144]**

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY

vs.

KOKE COMPANY OF AMERICA et al.

Affidavit of Edward S. Rogers.

State of Illinois,
County of Cook,—ss.

Edward S. Rogers, being duly sworn, deposes and states as follows:

I am one of counsel for the plaintiff in this proceeding.

The above-entitled proceeding is one of a number pending between the parties.

In the Patent Office of the United States under the title Coca-Cola Company v. Koke Company of America. This is a notice of opposition, for the purpose of opposing the attempted registration by the Koke Company of America, of the word Koke.

Coca-Cola Company vs. Southern Koke Company, Limited, James L. Wright and J. C. Mayfield and the Crescent City Seltz and Mineral Water Company, in the United States District Court for the Eastern District of Louisiana.

Coca-Cola Company vs. The Koke Company of Texas, **[145]** W. McCarty Moore, J. C. Van Winkle and E. M. Boyd, and George Bender, in the United States District Court, for the Northern District of Texas, Dallas Division.

Coca-Cola Company vs. Koke Company of America, J. C. Mayfield, Jr., and J. H. Van Deusen, in the United States District Court, for the Eastern Division of the Eastern District of Missouri, at St. Louis.

These cases are all upon a similar state of facts and are based upon the same acts of infringement, with the exception of the Patent Office case, which does not involve the use of the word "dope" by The Koke Company of America.

Since the same record is involved in all of these cases, it was stipulated and agreed by counsel that the testimony be taken together and the same transcript filed in all the cases.

I understand that Mr. A. B. Littleton has made an affidavit to the effect that the evidence in this cause was taken before the amendment or notice and that chance for proper cross-examination was not given.

The facts of the matter are that the taking of testimony on behalf of the plaintiff, in all of the pending cases, including this one, was begun at Atlanta, Georgia, on July 27, 1914, at the office of Candler, Thomson & Hirsch. On July 27th only one witness was examined—S. C. Dobbs, the plaintiff's vice-president, and his testimony was continued only until noon of that day, when an adjournment was taken until nine o'clock on July 28th. The adjournment was had at the request of counsel for the defendants,

one of whom had some engagement **[146]** and was unable to be present on that afternoon. Mr. A. B. Littleton, however, was present, and it was at his request that the adjournment was had. On the 28th, Mr. A. B. Littleton was joined by Mr. Jesse Littleton, and the testimony of W. L. Sams, George J. Martin, F. M. Robinson, Oscar C. Hightower, M. Tomlinson, Magnus L. Ramey, Winton H. Troutman, Asa G. Candler, John S, Candler, W. E. Venable, C. Howard Candler and D. E. Bolton was taken.

All of these witnesses were connected with the Coca-Cola Company and their testimony and cross-examination could in no way have been altered, changed or broadened by the averments of the amendment. Counsel was present, cross-examined the witnesses at great length and was in no way hampered.

At the adjournment of the taking of the testimony on the 28th, I personally advised Mr. A. B. Littleton that the plaintiff proposed to amend the pleadings in all the cases, to make a little more specific the general averments concerning infringement and unfair competition therein contained, and also to correct two mistakes. I stated to Mr. Littleton at that time specifically and definitely what amendments were proposed and what they would cover, and I immediately began the preparation of the amendments. The first one to be completed was the amendment in the Patent Office proceeding, which I drafted on July 29th and forwarded to Washington for filing on that day. I attach hereto a copy of a letter which I wrote to my Washington associate transmitting

the amendment. My recollection **[147]** is that I delivered to Mr. Littleton a copy of the amendment referred to in this letter on the date of the letter, July 29th. It may possibly not have been until the 30th but my recollection is that Mr. Littleton was given a copy on the 29th. The amendment as filed in the Patent Office is in all substantial respects the same (except that it contains no averment with respect to the defendants' use of the name "dope") as the amendments here proposed.

On July 29th and 30th I prepared the amendments in the other cases and copies were delivered to Mr. Littleton shortly thereafter.

To summarize, Mr. Littleton was fully advised on July 28th of our intention to amend and the nature of the amendments, and on July 29th or 30th he was given a copy of one of the amendments and shortly afterwards copies of all. He was fully advised of the nature and scope of the amendments and his cross-examination was in no wise restricted or hampered. He was given every opportunity to cross-examine all of the witnesses whose testimony was in any way affected by the amendments and availed himself of it fully. The taking of testimony in this case continued from July 27th up to August 18th. At every session counsel was present representing the defendants and cross-examination was very full and complete, and as far as I am able to discern could not have been fuller or more complete.

Amendments the same as those offered here have been offered in all of the other cases between the Coca-Cola Company and The Koke Company of

America and its subsidiaries and officers recited above. The amendments have been allowed to be filed in every such case **[148]** after hearing and over the objection of counsel for the Koke Company of America. In the Patent Office proceeding the amendment was first rejected by the Examiner of Interferences for jurisdictional reasons. On appeal, however, to the Commissioner of Patents, this action was reversed and the amendments were all allowed. A copy of the opinion of the Commissioner of Patents is attached hereto.

Amendments identical with those here proposed have been allowed in the United States District Court at St. Louis, in the United States District Court at Dallas and the United States District Court at New Orleans, all after hearing and objection and contest on behalf of the defendants.

EDWARD S. ROGERS.

Subscribed and sworn to before me this 15th day of January, 1915.

[Seal] MARGARET SHEALY,
Notary Public. **[149]**

July 29th, 1914.

Mr. Francis M. Phelps,
c/o Messrs. Browne & Phelps,
Barrister Bldg., Washington, D. C.

Dear Frank,

I am enclosing you original and two copies of an amendment of Notice of Opposition in the matter of the Coca-Cola Co. v. Koke Company of America.

It has developed in the taking of the evidence that

the name "Koke" is the commonly and familiarly known nickname for Coca-Cola, and has been for many years, and the word as used by the Koke Co. of America is to take advantage of this trade situation; that the infringement is not so much the imitation of the name Coca-Cola by "Koke," as an infringement of trademark proper by the deceptive use of a nickname which is applied to our product. I think perhaps the testimony is clearly competent under the general averments of the Notice of Opposition, but it seems to Mr. Hirsch and myself that there should be a specific averment that "Koke" is an abbreviation or nickname for Coca-Cola. Therefore, I am sending you this amendment, which I would be glad if you would ask leave to file, and file. I think we are entitled to amend under the equity rules, and that the proposed amendment in no way changes the general cause of action so as to divest the Office of jurisdiction.

Please serve notice on Johnson, and bring the matter up as soon as you can, and get leave to file the amendment, and file it. I have notified Littleton, who is here taking evidence, that we propose to amend, and will deliver to him in the morning copy of the amendment.

Sincerely yours,

_____.

R—Enclosures. **[150]**

Hearing: SET.

September 1, 1914.

In the United States Patent Office.

THE COCA-COLA COMPANY

v.

KOKE COMPANY OF AMERICA,

Opposition No. 1424.

APPEAL FROM EXAMINER OF INTERFERENCES.

Trademark for Nonalcoholic Beverage, etc.

Application of Koke Company of America Filed June 23, 1913, No. 71,308, Published December 9, 1913.

Mr. Harold Hirsch, Messrs. Frank F. Reed & Edward S. Rogers, and Messrs. F. L. Browne & Francis M. Phelps, for The Coca-Cola Company.

Mr. F. L. F. Johnson, for Koke Company of America.

Mr. Joseph W. Bailey, of Counsel.

This is an appeal by The Coca-cola Company from the decision of the examiner of interferences refusing to permit The Coca-Cola Company to amend its notice of opposition in the manner set forth in paragraphs 2, 3 and 4 of said proposed amendment filed August 3, 1914, the purport of which is that users of Coca-Cola frequently in ordering Coca-Cola ask for it as "Koke," to such an extent that "Koke" has become a familiar nickname for Coca-Cola, etc.

The decision of the examiner of interferences refusing the amendment seems to be based mainly on his opinion that this would set up a new ground of opposition, since it would enable The Coca-Cola

Company to prove prior use of the term "Koke." [151]

I do not concur in this opinion of the examiner of interferences. The proposed amendment does not set up a foundation for The Coca-Cola Company to prove its own prior use of the word "Koke." Its testimony, which has been completed, does not tend to prove any such proposition. Indeed, at the hearing the opposer inserted in its proposed notice that neither The Coca-Cola Company nor its predecessors had ever used this word "Koke," so that there is no foundation for the supposed new ground for action set up by the examiner of interferences.

It appears that the purpose of both the original notice and the amended notice is broadly the same, and while the reasons are stated more fully in the amended notice, and in some respects differently from those in the original notice, they are in effect the same ground of complaint, and the amendment to the original notice seems to have been brought in good faith to make the notice of opposition correspond with the details of the testimony (Brainard v. Buck, 184 U. S. 99).

I can see no valid reason for refusing the Coca-Cola Company's request to amend and the decision of the examiner of interferences is reversed.

J. T. NEWTON,
First Assistant Commissioner.

September 5, 1914. [152]

[Endorsed]: E. ——. U. S. Dist. Court, Arizona. Coca-Cola Company vs. The Koke Company of America et al. Affidavit of Edward S. Rogers on

Application to Amend the Bill of Complaint. Filed Jan. 23, 1915. George W. Lewis, Clerk. **[153]**

In the District Court of the United States for the District of Arizona.

IN EQUITY.

THE COCA-COLA COMPANY

vs.

THE KOKE COMPANY OF AMERICA et al.

Affidavit of Harold Hirsch.

State of Georgia,
County of Fulton.

Before me, an officer duly authorized to administer oaths, appears Harold Hirsch, who after being duly sworn deposes and says:

That this deponent is a member of the firm of Candler, Thomson & Hirsch, and that said firm has charge of the legal affairs of The Coca-Cola Company. That this deponent, together with Edward S. Rogers, of Chicago, Ill., is in charge of the litigation involved in the above-entitled cause.

This deponent further says that the testimony heretofore taken in the above-stated case commenced on the 27th day of July, 1914, at Atlanta, Ga., with Mr. A. B. Littleton as counsel for the defendant and this deponent and Edward S. Rogers, as counsel for plaintiff, present at the taking of the testimony. That due to the absence of the senior member of the firm of Littleton, Littleton & Littleton, and on the request of said senior member, the testimony of only

one witness was taken on said date, to wit, the 27th, that being the testimony of S. C. Dobbs.

Deponent further states that on the afternoon of the 28th or the morning of the 29th, of July, 1914, a copy of the proposed amendment in the above-stated cause was given to the said A. B. Littleton, attorney for the defendant, with [154] the statement that that amendment would be filed in the Patent Office case, and that similar amendments would be filed in each and every case wherein similar questions to the one involved in the above-stated cause are involved. That the said defendant, through its attorney, A. B. Littleton, was then and there put on notice that the said amendment similar to the one now offered in this case would be filed in each and every case. That at the time this notice was given to said defendant, the testimony of only two or three witnesses were taken. Deponent further shows that as soon and as rapidly as the amendments could be prepared which said amendments followed the one that had been presented to said A. B. Littleton, they were immediately forwarded to be filed in each and every case involving similar issues as the one involved in the above-stated case. Deponent further shows that an examination of the testimony taken and which is on file in the above-stated cause, will show that the question, as shown by the amendment, was involved at the time, and that while in some places only an objection was made to the testimony, in other places witnesses were carefully and in some places minutely examined in regard the terms "Dope" and "Koke."

Deponent further shows that the question involved in the amendment now offered in this cause has been involved in similar amendments offered in the United States Patent Office, in the District Court of the United States for the Northern District of Texas, in the District Court for the Eastern District of Missouri, and in the District Court for the Eastern District of Louisiana. That in the case of the amendment offered in the Patent Office, in Texas and in Missouri, arguments have been heard in opposition to the allowance of the amendment, and that in each instance, the amendment now **[155]** offered in the above case has been allowed.

Deponent further shows that this affidavit is made for use by the plaintiff in the application for leave to file an amendment.

And further this deponent saith not.

HAROLD HIRSCH.

Sworn to and subscribed before me, this 13 day of January, 1915.

[Seal] LILIAN STANSBURY,
Notary Public, Fulton County, Georgia.

[Endorsements]: E ——. U. S. District Court, Arizona. Coca-Cola Company vs. The Koke Company of America et al. Affidavit of Harold Hirsch on Application to Amend Bill of Complaint. Filed Jan. 23, 1915. George W. Lewis, Clerk. Candler, Thomson & Hirsch, Attorneys and Counsellors at Law, 902–907 Candler Building, Atlanta, Ga. **[156]**

In the United States District Court for the District of Arizona.

No. E.—21 (Phx.).

THE COCA-COLA COMPANY,

Complainant,

vs.

KOKE COMPANY OF AMERICA, SOUTHERN KOKE COMPANY, THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,

Defendants.

Order Granting Motion to File Amendments to Bill of Complaint.

The Court, having considered the application and motion to amend plaintiff's bill, together with the objections thereto,—

IT IS HEREBY ORDERED that the said application be, and the same is, hereby granted, and that complainant be permitted to file said amendment herein said leave being granted on such terms as may be fixed by this Court in the final decree herein.

Dated at Tucson, Arizona, this 17th day of February, 1915.

WM. H. SAWTELLE,

Judge of the United States District Court for the District of Arizona. [157]

[Endorsements]: In the United States District Court for the District of Arizona. The Coca-Cola

Company, Complainant, vs. Koke Company of America, Southern Koke Company, The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Order. Filed Feb. 17, 1915. George W. Lewis, Clerk. [158]

In the United States District Court for the District of Arizona.

No. E.—21 (PHX.).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA, SOUTHERN KOKE COMPANY, THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,

Defendants.

Order Sustaining Defendants' Objections to Interrogatories 1–12.

In the above-entitled cause,

IT IS ORDERED by the Court that defendants' objections, as amended, filed to the plaintiff's interrogatories 1 to 12, inclusive, filed herein by the plaintiff July 1, 1914, are hereby overruled, and the defendants, and each of them, will answer said interrogatories separately and fully, as required by law and the rules of this Court.

Dated at Tucson, Arizona, this 17th day of February, 1915.

WM. H. SAWTELLE,
Judge of the United States District Court for the District of Arizona. [159]

[Endorsements]: In the United States District Court for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. Koke Company of America, Southern Koke Company, The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Order. Filed Feb. 17, 1915. George W. Lewis, Clerk. [160]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,
Defendants.

Amended Bill of Complaint.

And now comes the plaintiff herein, The Coca-Cola Company, and by leave of the Court heretofore had and obtained, files its Amended Bill of Complaint herein as follows:

The Coca-Cola Company, a corporation duly organized and existing under and by virtue of the laws of the State of Georgia and a citizen of the State of Georgia, with its residence and principal place of business in the City of Atlanta in said State, brings this, its Amended Bill of Complaint, against Koke Company of Americam, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas. Each of said defendants is a corporation duly organized and existing under and by virtue of the laws of the State of Arizona and each has its office and principal place of business in the City of Phoenix, Arizona, and each is a citizen of the State of Arizona and is a resident and inhabitant of the District of Arizona. The jurisdiction of this Court in **[161]** this suit depends upon the following grounds, to wit:

(a) This suit is brought for injunction, preliminary and perpetual, an accounting of profits and assessment of damages against the defendants upon the ground of their joint and several infringement of the trademark of the plaintiff, "Coca-Cola" and for unfair competition on the part of the defendants.

(b) In this suit there is a controversy between citizens of different states, wherein the sum or value in controversy, to wit, the value of the trademark name "Coca-Cola" and trade insignia of plaintiff for which protection is sought and the damages and injury thereto by the acts of defendants and the profits accruing to defendants by their infringing and fraudulent acts, exceeds exclusive of interest and costs, the

sum or value of Three Thousand Dollars.

(c) This suit is also brought upon the ground of the joint and several infringement by the defendants in commerce conducted among the several States of the United States, and foreign nations of the trademark "Coca-Cola" of the plaintiff duly registered under the Act of Congress of March 3, 1881, in the United States Patent Office on January 3, 1893, by the plaintiff, and duly registered by the plaintiff in the Patent Office of the United States under and by virtue of the provisions of the Act of Congress of February 20, 1905, entitled, "An Act to Authorize the Registration of Trademarks used in commerce with foreign [162] nations, among the several States of the United States, and with the Indian Tribes, and to Protect the same." Said registration relates to articles of merchandise of the same descriptive properties as the article and merchandise upon which and in connection with which the infringing marks and names used by the defendants are employed.

For its cause of action plaintiff states:

(1) That prior to the year 1886, J. S. Pemberton, of Atlanta, Georgia, began to make, according to a secret formula, which is now the sole property of plaintiff, a syrup for the manufacture of a refreshing nonalcoholic beverage, and that prior to the year 1886 he adopted as the trademark therefor the name "Coca-Cola," which was at the date of the adoption thereof, as aforesaid, in all respects new, original and distinctive and had never before been used. The said J. S. Pemberton continued alone to sell his

product under the name "Coca-Cola" until about the 8th day of July, 1887, when he sold a two-thirds interest in said business to one, Lowndes, and one, Venable, and that the said Pemberton, Venable and Lowndes became and continued to be the sole and exclusive owners and proprietors of the said secret formula, business and goodwill and the trademarks connected therewith, and together continuously carried on said business until about December 14, 1887, when the said Venable and Lowndes duly sold, assigned and transferred to one Dozier and one Walker their whole interest in the said business and the goodwill thereof and in [163] all secrets, formulas, trademarks, trade names and labels used in connection with the said business, and that said Dozier, Walker and Pemberton continued to be the sole and exclusive owners and proprietors thereof and together continuously carried on said business until about the 14th day of April, 1888, when said Pemberton duly sold, assigned and transferred all of his interest in the said secrets, formulas, business and the goodwill thereof and all trademarks and trade names used in connection therewith to Walker, Candler & Co., a copartnership composed of W. Walker, A. G. Candler and Joseph Jacobs, and that the said Walker, Candler & Co. and Dozier and said W. Walker, in his individual capacity, became and continued to be the sole and exclusive proprietors of said business and in the goodwill thereof and in all secrets, formulas, trademarks, trade names and labels used in connection with said business and together continuously carried on said business until

about the 17th day of April, 1888, when said W. Walker and said Dozier duly sold, assigned and transferred to A. G. Candler one-half of their two-thirds interest in said business and in the goodwill thereof and in all secrets, formulas, trademarks, trade names and labels used in connection therewith, and that the said Walker and Dozier, A. G. Candler and Candler & Co. became and continued to be the sole and exclusive owners and proprietors of the said business and the goodwill thereof and of all formulas, trademarks, trade names and labels, and together continuously [**164**] carried on said business until about the 30th day of August, 1888, when the said W. Walker and the said Dozier sold, assigned and transferred to A. G. Candler all of their remaining interest in the said business and in the goodwill thereof and all formulas, trademarks, trade names and labels used in connection with the said business, and that the said Walker, Candler & Co., and A. G. Candler became and continued to be the sole and exclusive owners and proprietors of the said business and the goodwill thereof and of all secrets, formulas, trademarks, trade names and labels used in connection therewith and together continuously carried on said business until on or about the 22d day of April, 1891, when the said Walker, Candler & Co. duly (sold, assigned and transferred to Asa G. Candler who is the same person as A. G. Candler above referred to), all of their right, title and interest in said business and in the goodwill thereof and any and all trademarks, trade names and labels used in connection therewith, and that the said Asa G.

Candler became and continued to be the sole and exclusive owner and proprietor of said business and the goodwill thereof and of all trademarks, trade names and labels connected therewith, and continuously carried on said business until about the 22d day of February, 1892, when the said Asa G. Candler duly sold, assigned and transferred to plaintiff all of his right, title and interest in and to said business and in the goodwill thereof [165] and in all secrets, formulas, trademarks, trade names and labels used in connection therewith, and that plaintiff has since continued to be the sole and exclusive owner and proprietor of said business and the goodwill thereof and of all secrets, formulas, trademarks, trade names and labels and has continuously owned and conducted the said business, goodwill, secrets, formulas, and owned and used said trademarks, trade names and labels down to the present time and is now conducting and using the same. Said formula and process for the manufacture of said beverage styled "Coca-Cola" was new and original and invented and discovered by said Pemberton and has at all times been kept and conserved by plaintiff, its predecessors and their employees as a trade and business formula, process and secret, and is now a secret formula and process and not known to the public or others than said plaintiff and its officers and employees and the predecessors of plaintiff.

(2) That continuously and without interruption plaintiff and its predecessors, during the period aforesaid from prior to 1886 to this date, have manufactured, marketed and sold syrups made under and

in accordance with said secret formula and process to be used in making a tonic beverage and that since the inauguration of said business, prior to the year 1886 by plaintiff's predecessors, as alleged in the preceding paragraph, said name "Coca-Cola" has been continuously used as a trademark name for the products so made and sold by plaintiff and its said predecessors, which said [166] trademark name was at the date of its adoption by plaintiff's predecessors aforesaid, in all respects new, characteristic and distinctive and had never before been used. Said trademark name "Coca-Cola" was at the outset and always has been and is now, new, characteristic and distinctive and was adopted and has been used for the purpose of distinguishing the product of plaintiff and its predecessors from the similar products of others, and the said trademark name does now identify and distinguish the said product.

That in addition to the trademark name Coca-Cola, which is very generally used by purchasers who desire plaintiff's beverage, there are also, used and employed certain nicknames by which plaintiff's product is known, asked for and identified by purchasers and consumers thereof. That one of the said nicknames is the word "Koke" into which plaintiff's trademark name Coca-Cola has been abbreviated by the public, and another of said nicknames is the word "Dope," and said words "Koke" and "Dope" and each of them, are now and for many years past have been, and prior to the application of either of them to any other beverage, recognized and commonly and familiarly used nicknames for

Coca-Cola, and the words "Koke" and "Dope" and each of them have been for many years commonly and familiarly used nicknames for plaintiff's said beverage, so that a request at a soda-fountain or wherever beverages are on sale, for "Koke" or "Dope" is understood to be a specific and definite request for Coca-Cola, so intended by the purchaser using such word, and so understood by the dealer, and for very many years, and continuously to the present time, and [167] before the application of said words "Koke" or "Dope," or either of them, to any other beverage whatsoever, the said words "Koke" and "Dope" indicated, designated and identified, and now indicate, designate and identify exclusively plaintiff's said product, and mean it and nothing else.

(3) Plaintiff further states that after it had become so vested with and entitled to the sole and exclusive right to the use of the said trademark Coca-Cola, and was the owner thereof, as its trademark, plaintiff did, on the 14th day of May, 1892, duly apply to the United States Patent Office for registration of the said trademark Coca-Cola and thereupon, did make the statement and declaration required by law for such registration, and did show that said trademark had been used by the plaintiff and its privies in title for a tonic syrup or beverage in commerce between the States of the United States, and with foreign nations, and complied in all respects with the Act of Congress of March 3d, 1881, entitled, "An Act to Authorize the Registration of Trade Marks and Protect the Same," and complied with all

the regulations of the Commissioner of Patents in that behalf, and thereupon, on the 31st day of January, 1893, the registration of the said trademark Coca-Cola was duly allowed for nutrient or tonic beverages, and certificate of registration thereof was granted to plaintiff, dated January 31st, 1893, which said registration and certificate thereof are still in full force and effect, and wholly unrevoked and uncanceled. A copy of the said Certificate of Registration is attached hereto marked Exhibit "A" #1. [168]

9.

Plaintiff further states that after it had become so vested with and entitled to the sole and exclusive right to use the said trademark "Coca-Cola" and was the owner thereof as a trademark for syrups for the manufacture of beverages, plaintiff did, on April 22, 1905, under and by virtue of the Act of Congress, approved February 20, 1905, duly apply to the United States Patent Office for the registration of the said trademark "Coca-Cola" and thereupon did make the statement and declaration required by law for such registration and did show that said trademark had been used by plaintiff and its predecessors as a trademark for tonic beverages and syrups for the manufacture of such beverages in commerce among the several States of the United States and with foreign nations and the Indian tribes and complied in all respects with the statute in that case made and provided and the regluations of the Commissioner of Patents, and thereupon, on the 31st day of October, 1905, registration of the said trademark "Coca-

Cola" was duly allowed for tonic beverages and syrups for the manufacture of such beverages, and a certificate of registration thereof was granted to plaintiff, dated October 31, 1905, and numbered 47,189, which said registration and the certificate thereof are still in full force and effect, wholly unrevoked and uncanceled. A copy of the certificate of such registration is hereto attached, marked Exhibit "A."

And by virtue of the premises and by virtue of the said registrations aforesaid, plaintiff is entitled [169] to the sole and exclusive right, both generally and specially in commerce among the several states, in foreign commerce and in commerce with the Indian tribes, to use and employ the trademark name "Coca-Cola" or any like word as a trademark for and upon the said products and articles aforesaid, and upon merchandise of substantially the same descriptive properties and that such right of plaintiff has been generally acknowledged and acquiesced in by the trade and public.

(4) Plaintiff's product is in the form of a syrup for the manufacture of a refreshing nonalcoholic beverage, and is made by plaintiff and in some instances furnished to bottlers, who under authority from plaintiff and under the supervision and control of plaintiff add aerated water thereto, making an aerated beverage, which is then bottled and sold to dealers and consumers under a distinctive and identifying label and bottle bearing plaintiff's said trademark "Coca-Cola." Said syrup also is sold and supplied by plaintiff to soda dispensers and is by

them, under the direction and instruction of plaintiff, mixed with water for consumption at soda-fountains. Plaintiff furnishes as a receptacle for its said syrup to soda dispensers a distinctive and characteristic display dispensing bottle or decanter. Plaintiff's said trademark name "Coca-Cola" is used by it upon labels attached to the receptacles containing said syrup and upon labels attached to the bottles containing the aerated beverage made from plaintiff's said syrup and put out by bottlers authorized by plaintiff and has always been printed and displayed in a characteristic and distinctive style of lettering. [170] Plaintiff's syrup has certain peculiarities of taste, color and appearance and is and long has been marketed by plaintiff in barrels or kegs, painted with a particular shade of red and readily distinguished by reason thereof, and marked with labels bearing conspicuously the trademark name "Coca-Cola," and that plaintiff's syrup has a characteristic and distinctive appearance due to the color thereof, which is arbitrary, unusual, unnecessary and was originally adopted and is now used as a means of distinguishing plaintiff's product from similar products of others, and that said color does in fact so identify and distinguish plaintiff's product in the mind of dealers, buyers, users and the public generally.

(5) Plaintiff's said product as dispensed to the public is a refreshing, nonalcoholic beverage, and is and has been very extensively advertised by plaintiff at an enormous expense and is well and favorably known throughout the United States, and the trade-

mark name "Coca-Cola" as the name thereof has long possessed and now has a great value and plaintiff's product sold thereunder is a meritorious and valuable article of merchandise, and that the said trademark name "Coca-Cola," the said nicknames therefor "Koke" and "Dope," the original and distinctive style of lettering used therefor, the said distinctive color, appearance and characteristics of the said syrup, the barrels or kegs in which the same is contained, distinctively colored red as aforesaid, the distinctive dispensing bottles or decanters and the distinctive and characteristic labels above referred to, and the distinctive bottles and labels containing the said [171] aerated beverage made from plaintiff's syrup and put up in such bottles with said labels by and under the authority of plaintiff, each by itself and all in combination, identify and distinguish plaintiff's said product and point exclusively to plaintiff as the origin thereof. Plaintiff has also and does use said trademark name "Coca-Cola" in the peculiar and distinctive style and colors on its stationery, letter-heads, bill-heads, and envelopes, circulars and price lists.

(6) That the defendant Koke Company of America, is a corporation of the State of Arizona, and was organized about September 15, 1911 and thereafter proceeded, at the city of St. Louis, Missouri, through its agents to manufacture an extract in unnecessary and deliberate imitation in color and appearance of plaintiff's Coca-Cola syrup, but different therefrom and greatly inferior thereto, and said extract is by said defendant, Koke Company of America, at St.

Louis, placed in barrels deliberately and purposely colored a peculiar shade of red in imitation of plaintiff's distinctively colored barrels. Said extract is designated by said defendant sometimes as "Koke" and sometimes as "Dope," and is sold and distributed under said names by it, which said name "Koke" is a common and familiar abbreviation of plaintiff's trademark name Coca-Cola, and it and the said name "Dope" each are commonly and familiarly known and recognized nickname for plaintiff's said product, and mean it and nothing else. That the defendant, Koke Company of America sells and ships from the City of St. Louis said imitative extract usually under the said name "Koke," and in said imitated barrels, to the defendants, [172] Southern Koke Company Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas, each of which is a corporation of the State of Arizona, Southern Koke Company, Limited, operating and doing business in the City of New Orleans, and the Koke Company of Texas operating and doing business in the City of Dallas, Texas. The said extract is by said last-named corporations, used as a basis for making a syrup for sale to soda-fountains and bottlers from which syrup and aerated beverage can be made and is made, which said syrup resembles Coca-Cola syrup made by plaintiff, in color, taste and appearance and which said syrup so made from said extract by the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas,

is called and styled "Koke" and "Koke Syrup," "Dope" and "Dope Syrup," and is put up in barrels, decanters and dispensing bottles, similar in shape, size and color to the barrels, decanters and dispensing bottles used by plaintiff for Coca-Cola syrup and marked with the word "Koke" in style similar to the style of Coca-Cola as used by plaintiff upon said receptacles and which said imitative syrup and the said beverage are by said defendants and dealers who purchase from them, sold, substituted and palmed off as and for Coca-Cola syrup and beverage, and that said defendants, as a matter of fact, do sell, substitute and palm off the said syrup and extract as Coca-Cola and as and for plaintiff's said Coca-Cola syrup, and that the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, and the Koke Company of Arkansas, all actively connive at and participate in said fraud, substitution [173] and deception.

(7) That the adoption and use by the said defendant, Koke Company of America of the words "Koke" and "Dope" began many years after the plaintiff's said product under the name Coca-Cola, and under the abbreviations and nicknames "Koke" and "Dope" had become widely and favorably known, and the said words "Koke" and "Dope" were adopted by the said Koke Company of America, and used by it and the defendants herein, for the purpose only of enabling them and dealers who purchased from them, to pass off the said imitative product of the defendants and the beverage made

therefrom, as and for Coca-Cola, and for the purpose of taking an unfair and unlawful advantage of the reputation of, and demand for, plaintiff's said product; that defendants deliberately and intentionally, and without any need or necessity, make said syrup by them designated "Koke" and "Dope," like the Coca-Cola syrup of plaintiff, in color, taste and appearance, in order to enable the use and substitution thereof as genuine Coca-Cola syrup, and the beverage made therefrom to be passed off as the genuine Coca-Cola beverage; that the form in which the said word "Koke" is printed by defendants and applied to the product sold by them, is in deliberate and designed imitation of the characteristic and distinctive form of plaintiff's manner of printing its trademark name Coca-Cola; that the spurious product of The Koke Company of America under the said names "Koke" and "Dope" as sold and distributed by defendants herein, has in the past, and is now being substituted, dispensed and palmed off upon the public by the defendants [174] herein, and their vendees, as and for plaintiff's said product; that the use by defendants of the names "Koke" and "Dope" has in fact, caused deception of the public, and is not deceiving the public into the belief that the said spurious product is the product of the plaintiff, and that the said passing off and deception are effectuated by the use by said defendants of the words "Koke" and "Dope" as applied to the product of the said Koke Company of America, which said names, and each of them, are commonly and familiarly known and recognized nicknames for

plaintiff's said product, which fact plaintiff is informed and believes, and states the fact to be, is well known to defendants and each of them, and said words were adopted and used by the said defendants for the purpose of substituting, passing off and deception, and for no other purpose; and to enable dealers and dispensers to substitute and pass off the said spurious product of the Koke Company of America when the plaintiff's produce is asked for, either by the name Coca-Cola, or by its recognized, familiarly known and commonly used nicknames, and the said deception and passing off are aided by the fact that said syrup under the names "Koke" and "Dope" is placed by said defendants in barrels colored red, in imitation of plaintiff's distinctive barrels, and so furnished both to soda-fountain stands, dispensers, and to bottlers, for manufacture into an aerated beverage, which said aerated beverage when sold, is sold under the name of "Koke" or "Dope," and that [175] defendants have applied to aerated products put up under their alleged authority and made from said syrup produced by the Koke Company of America, labels in imitation of plaintiff's distinctive labels, upon the aerated Coca-Cola made by both plaintiff and authorized bottlers from genuine Coca-Cola Syrup, and that the said syrup product of said Koke Company of America so used is unnecessarily and fraudulently colored in imitation of the distinctive color of plaintiff's product. Said defendants also, furnish to soda-fountain dispensers, dispensing bottles or decanters in deliberate imitation of plaintff's distinctive dis-

pensing bottles or decanters.

Exhibit "B" hereto is a photograph which shows a bottle bearing plaintiff's label containing the aerated beverage produced under plaintiff's authority from genuine Coca-Cola syrup, side by side, with a bottle containing an aerated product made from the syrup "Koke" put up and labeled under alleged authority of defendant, Koke Company of America, by the defendant, Southern Koke Company, which is the Arizona corporation above named as the Southern Koke Company, Limited, defendant herein. Said bottled Koke bears a label in imitation of plaintiff's distinctive label and shows the deceptive word Koke printed thereon in said imitated type and form of lettering. Attached hereto as Exhibit "C" is a photograph of plaintiff's distinctive dispensing bottle or decanter and defendant's imitated dispensing bottle.

(8) Defendants state to both the bottlers and dispensers of the syrup sold by the said defendants under the **[176]** names "Koke" and "Dope" that said syrup is made under the same syrup formula as Coca-Cola syrup, and by one who is acquainted therewith, and was at one time interested in said formula, all of which statements are false, and known to defendants to be false, and said defendants advise and instruct said bottlers of said product designated by them "Koke" and "Dope" and retail purchasers of the same, and retail dealers buying and selling the same, and also, dispensers thereof, to sell, substitute and palm off on buyers for use and consumption asking for and intending to purchase the genuine Coca-

Cola, either under the trademark name Coca-Cola, or some recognized, commonly used and familiarly known nickname thereof, the said beverages made from the syrup of the defendant, and designated by them "Koke" and "Dope," and said retailers and dispensers follow said instructions and do deceive buyers, and users, and substitute and palm off defendant's said product as and for the genuine product of the plaintiff. That it is the intention and design of the said defendants manufacturing and distributing said imitative and spurious product under the names "Koke" and "Dope," and each of them, by and through the use and employment of said words "Koke" and "Dope," the said spurious and imitative syrup, and the aforesaid simulated receptacles, labels, styles, signs and devices adopted and employed in connection therewith, to enable retail dealers and dispensers who are supplied therewith, to substitute and pass off the spurious beverage made from said spurious syrup, in response to requests for, and as the genuine Coca-Cola beverage, and that such substitution and passing off have been and are successfully and constantly accomplished **[177]** by such retail dealers and dispensers, and purchasers and consumers are thereby deceived and defrauded. That it is also, the intention and design of said defendants manufacturing and dispensing said imitative and spurious syrup, and of said defendant engaged in aerating and bottling the spurious beverage made therefrom, that through and by the use of the said words "Koke" and "Dope," and the said imitative and spurious syrup, and the afore-

said simulated receptacles, bottles, caps, styles, labels and signs and devices, adopted and employed as aforesaid, to enable retail dealers supplied with said aerated beverage put up in said bottles bearing said names "Koke" and "Dope," and dressed up in the fraudulent and deceptive style aforesaid, thereby to substitute and pass off, in response to inquiries for plaintiff's product, and as and for the plaintiff's product, said spurious aerated bottled beverage, and that through and by the means aforesaid, said substitution and passing off have been and are systematically and constantly accomplished, by such retail dealers and purchasers, and consumers are thereby deceived and defrauded.

(9) The Koke Company of America claims to have secured, or now to own certain alleged registration in the United States Patent Office, of the words "Koke" and "Dope," which said registrations were secured in fraud of plaintiff's rights, and said Koke Company of America, and its emissaries, including the defendants herein, threaten dealers in Coca-Cola, who dispense and sell Coca-Cola in response to the universally known and commonly used nickname therefore, **[178]** "Koke" and "Dope," with prosecution and suit, claiming the words "Koke" and "Dope" to be the registered trademarks of The Koke Company of America, and that the sale of any beverage other than the product of the Koke Company of America, on calls for "Koke" and "Dope" is an infringement of the alleged rights of The Koke Company of America, and of said alleged registrations, and that the same is a violation of the Federal laws,

and threatening prosecution therefor. That the said threats are for the sole purpose of harassing persons selling plaintiff's product and damaging and embarrassing plaintiff in its business, and that defendants well know and have long known that neither they nor the Koke Company of America, have any rights in the names "Koke" and "Dope," but that the same are well recognized nicknames of plaintiff's product, universally so understood by the public and recognized by dealers.

Plaintiff, therefore, prays—

(1) That the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and the Koke Company of Arkansas, and each of them, be made parties defendant hereto, and that said defendants, and each of them, be required to answer each and every allegation herein, but not under oath, the answer of each of said defendants under oath being hereby waived.

(2) That a hearing may be had herein and the plaintiff's rights in the premises be established and adjudicated.

(3) That said defendants, and each of them, their officers, servants, agents, employees, attorneys, licensees and assigns, and all acting by or under their authority, may **[179]** be at first during the pendency of this suit, and afterwards perpetually, enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-

Cola," or any like word, or the word "Koke," or any like word, or the word "Dope" or any like word, or any name, or nickname, by which plaintiff's product is commonly known; from claiming or asserting any right in the name "Koke" or in the name "Dope," or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product, Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices now used by the defendants; from using in connection with the sale or shipment any product, not the plaintiff's, barrels or receptacles colored in imitation of the plaintiff's said barrels or receptacles; from stating or representing that the syrup made or sold by defendants or any of them is made from the same formula as Coca-Cola syrup or that defendants or any of them may rightfully use or employ the Coca-Cola formula; from coloring or otherwise contriving any product not the plaintiff's in such a way as to be calculated to induce the belief that the same is the plaintiff's and further, from doing any act or thing, or using any name or names, devices, artifices, or contrivances, which may be calculated to represent that any product not of plaintiff's production is the [180] genuine "Coca-Cola" of plaintiff.

(4) That defendants and each of them may be required to account to plaintiff for any and all profits derived by them by reason of their unlawful conduct in the premises.

(5) That defendants may be required to pay to the plaintiff such damages as it may have sustained by reason of the defendants' *unlaw* conduct.

(6) That defendants may be required to pay the costs of this suit and that plaintiff may be decreed to such other and further relief as the court may seem just.

(7) That process of this court issue directed to the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas, and each of them, commanding them to be and appear before this Honorable Court at Phoenix, Arizona, on a day certain therein named, there to answer, make and abide the further order of the court.

[Corporate Seal] THE COCA-COLA CO.
By CHAS. H. CANDLER, V. Pt.,
Plaintiff.

J. E. MORRISON,
Solicitor for Plaintiff.
CANDLER, THOMSON & HIRSCH,
FRANK F. REED and
EDWARD S. ROGERS,
Of Counsel for Plaintiff. **[181]**

State of Georgia,
County of Fulton,—ss.

Charles H. Candler, being duly sworn, deposes and says that he is vice-president of The Coca-Cola Company, plaintiff herein; that plaintiff is a corporation and affiant makes this affidavit and verification for it and in its behalf and is duly authorized so to do; that

he has read the above and foregoing Amended Bill of Complaint and knows the contents thereof, and that the same is true.

CHAS. H. CANDLER.

Sworn to and subscribed before me this 31 day of Aug., 1914.

[Notarial Seal] W. A. LANDERS,
Notary Public, Fulton County, Ga. [182]

UNITED STATES PATENT OFFICE.

THE COCA COLA COMPANY, OF ATLANTA, GEORGIA.

TRADE-MARK FOR NUTRIENT OR TONIC BEVERAGES.

STATEMENT and DECLARATION of Trade-Mark No. 22,406, registered January 31, 18
Application filed May 14, 1892.

STATEMENT.

To all whom it may concern:

Be it known that THE COCA COLA COMPANY, a corporation organized under the laws of the State of Georgia, and located in the city of Atlanta, Fulton county, in the State of Georgia, and doing business in said city of Atlanta, has adopted for its use a Trade-Mark for a Tonic, Sirup, or Beverage, of which the following is a full, clear, and exact specification.

The said trade-mark of said company consists of the word or words "Coca-Cola." These words have been generally written as a compound word and in the particular form represented in the accompanying fac-simile, that is to say, with the lower portion of the "C" beginning the word "Coca" extended under the entire word, in the form of a dash, and the top of the "C" beginning the word "Cola" extended over the letters following in the form of a dash. Upon the dash of the first "C" said corporation generally has the word "Trade-Mark." While said corporation prefers to form the initial "C's" as just described, and also to form the word as a compound word, yet the word may be altogether as one word, or separately as two words, and the dashes omitted, without materially altering the character of the said trade-mark, the essential feature of which is the word "COCA-COLA."

This trade-mark was adopted by the proprietor in title of THE COCA COLA COMPANY, about the 28th day of June, 1887, and has been continuously used by them and the said corporation since that time.

The class of merchandise to which this trade-mark is appropriated is beverages, and the particular goods comprised in such class to which it is used by the said company is nutrient or tonic beverages. It is usually affixed to the goods by either affixing it to the bottles, kegs or barrels containing the same, in the form of a label, or by printing or stamping the same thereon, or by blowing the letters in the bottle itself.

THE COCA COLA COMPANY,
By ASA G. CANDLER,
President.

Witnesses:
JOHN S. CANDLER,
WM. A. HAYGOOD.

DECLARATION.

State of Georgia, county of Fulton, ss:

ASA G. CANDLER being duly sworn, deposes and says that he is president of the corporation, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said corporation has at this time a right to the use of the trade-mark therein described; that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trade-mark is used by the said corporation in commerce between the United States and foreign nations and Indian tribes and particularly with Canada, and that the description and fac-simile presented for record truly represent the trade-mark sought to be registered.

ASA G. CANDLER.

Sworn and subscribed to before me, a notary public, this 6th day of May, A. D. 18[illegible].
[L. S.] WM. A. HAYGOOD,
Notary Public, Fulton County, Georgia.

(EXHIBIT A—1)

TRADE-MARK.

THE COCA COLA COMPANY.
NUTRIENT OR TONIC BEVERAGES.

No. 22,406. **Registered Jan. 31, 1893.**

Coca-Cola
TRADE MARK

Witnesses
Geo. E. Fuchs
Robt. A. Fitzgerald

Proprietor
The Coca Cola Co
per
Dickinson Patterson and Merlett
Attorneys.

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(EXHIBIT A #1.)

179

UNITED STATES PATENT OFFICE.

THE COCA COLA COMPANY, OF ATLANTA, GEORGIA.

TRADE-MARK FOR TONIC BEVERAGES AND SYRUPS FOR THE MANUFACTURE OF SUCH BEVERAGES.

No. 47,189. **Statement and Declaration.** **Registered Oct. 31, 1905.**

Application filed April 22, 1905. Serial No. 2,730

STATEMENT.

To all whom it may concern.

Be it known that THE COCA COLA COMPANY, a corporation duly organized under the laws of the State of Georgia, and located in the city of Atlanta, county of Fulton, in said State, and doing business at No. 179 Edgewood avenue, in said city of Atlanta, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark of this corporation consists of the words "COCA-COLA."

This trade-mark has been continuously used in the business of said corporation and those from whom it derived its title since about the 28th day of June, 1887.

The class of merchandise to which this trade-mark is appropriated is beverages, and the particular description of goods comprised in said class upon which this trade-mark is used is tonic beverages and syrups for the manufacture of such beverages.

The trade-mark is generally displayed on the packages containing the goods by placing thereon a printed label on which the same is shown and by printing or stamping the same thereon or by blowing the letters into the bottles or other containers of the goods.

THE COCA COLA COMPANY,
By ASA G. CANDLER,
Its President.

DECLARATION.

State of Georgia, county of Fulton, ss:

ASA G. CANDLER being duly sworn deposes and says that he is the president of the corporation the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said mark is used by said corporation in commerce among the several States of the United States and all of said States, and between the United States and foreign nations and Indian tribes, and particularly between the United States and the Republics of Mexico and Cuba, and with Canada and the five civilized tribes of Indians; that the description, drawing and specimens presented truly represent the mark sought to be registered; and that the mark has been in actual use as a trade-mark of the applicant for more than ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ASA G. CANDLER.

Subscribed and sworn to before me, Z. D. HARRISON, Clerk of the supreme court of the State of Georgia, this the 17th day of April, 1905.

[L. S.] Z. D. HARRISON.
Clerk of the Supreme Court of Georgia. [20]

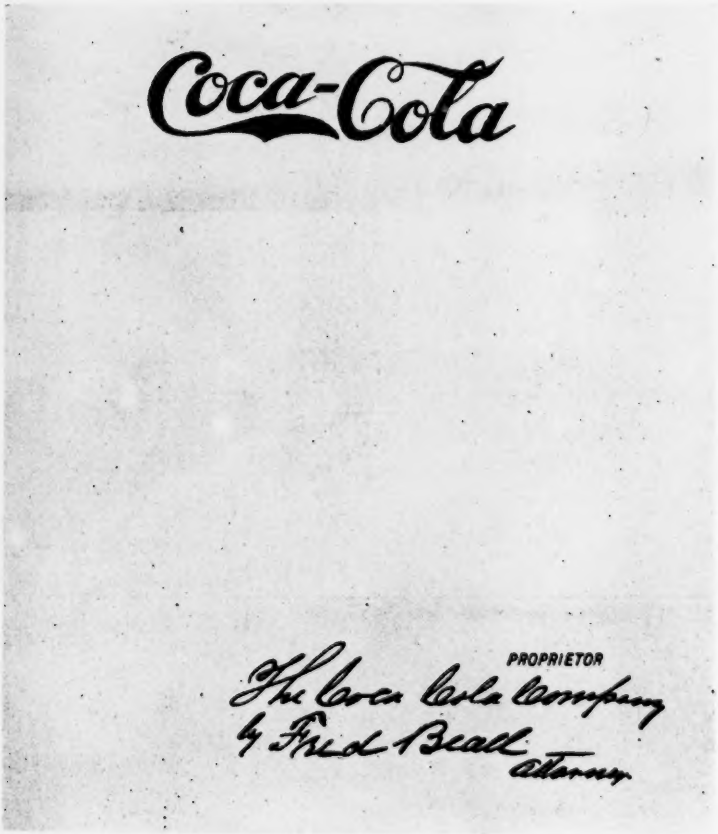
TRADE-MARK.

No. 47,189. REGISTERED OCT. 31, 1905.

THE COCA COLA COMPANY.

TONIC BEVERAGES AND SYRUPS FOR THE MANUFACTURE OF SUCH BEVERAGES.

Application Filed Apr. 22, 1905.



[186]

[187]

[188]

[Endorsements]: United States District Court for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Amended Bill of Complaint. Service acknowledged 1/5/15. Richard E. Sloan, James Westervelt, Solicitors for Defts. Filed Feb. 20, 1915, at —— M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. **[189]**

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Saturday, March 13, 1915.

The objections to interrogatories to be propounded to the defendants herein are argued by J. E. Morrison, Esq., upon behalf of the plaintiff and Richard E. Sloan, Esq., upon behalf of the defendants.

Upon motion of the defendant IT IS ORDERED by the Court that the defendants be allowed thirty days within which to file their answer to the plaintiff's amended bill of complaint on file herein, in accordance with stipulation of counsel. **[190]**

In the United States District Court for the District of Arizona.

No. E–21 (PHX.).

COCA–COLA COMPANY,

Plaintiff.

vs.

KOKE COMPANY OF AMERICA, SOUTHERN KOKE COMPANY, THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OLAHOMA, and THE KOKE COMPANY OF ARKANSAS,

Defendants.

Order Sustaining Defendant's Objections to Interrogatories 1 to 12.

In the above-entitled cause,

IT IS ORDERED by the Court that the order heretofore entered herein, dated the 17th day of February, 1915, overruling defendants' objections, as amended, filed to the plaintiff's interrogatories 1 to 12, inclusive, be vacated and that in lieu thereof the following order be entered herein:

IT IS ORDERED by the Court that defendants' objections, as amended, filed to plaintiff's interrogatories 1 to 12, inclusive, are hereby sustained.

Dated at Tucson, Arizona, this 23d day of March, 1915.

WM. H. SAWTELLE,

Judge of the United States District Court for the District of Arizona. **[191]**

[Endorsed]: No. E–21 (Phoenix). In the United States District Court for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. Koke Company of America, Southern Koke Company, The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Order. Filed Mar. 23, 1915. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. **[192]**

In the District Court of the United States for the District of Arizona.

No. 21—IN EQUITY.

THE COCA-COLA COMPANY

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF ARKANSAS, THE KOKE COMPANY OF OKLAHOMA.

Answer to Amended Bill of Complaint.

THE ANSWER OF DEFENDANTS TO THE AMENDED BILL OF COMPLAINT HERETOFORE FILED IN THIS CAUSE

Respondents, for answer to so much and such parts of the amended bill as they have not heretofore answered, and as they are advised it is necessary for them to answer, say:

I.

For answer to paragraph I of the amended bill, respondents say:

They have no knowledge as to whether or not plaintiff registered its alleged trademark, "Coca-Cola," in the United States Patent Office on January 3, 1893, as alleged, but, if plaintiff did so register it, respondents charge that said registration was void, and of no effect because the respondents are advised and believe, and accordingly state the fact to be, that up to that time neither the plaintiff nor any of its predecessors in title, or alleged predecessors in title, had ever used said words "Coca-Cola" as a trademark for plaintiff's product in commerce with any foreign nation, or with any of the Indian tribes, and the registration of said mark [193] was therefore procured by fraud.

For further answer to paragraph 1 of the amended bill, respondents say:

They deny that the bill as amended presents any issue of trademark infringement or involves any controversy with reference to plaintiff's alleged trademark "Coca-Cola," and they therefore deny that this suit is brought upon the ground of infringement by them of plaintiff's alleged trademark, "Coca-Cola," in interstate or foreign commerce, or in commerce with the Indian tribes.

II.

For answer to the third paragraph of the amended bill, respondents say:

They deny that either the word "Koke," or the word "Dope," was a commonly and familiarly known and accepted nickname for plaintiff's product, "Coca-Cola," prior to the adoption and use of said words as trademarks for their product by the

respondents and their privies in title. And respondents deny that the public had abbreviated the name "Coca-Cola" into the name "Koke" prior thereto, and they deny the word "Koke" is now or ever was an abbreviation of the words "Coca-Cola." They deny that either the word "Koke" or the word "Dope" indicates, designates or identifies exclusively plaintiff's said product, "Coca-Cola," or that it ever did so. They deny that a request at a soda-fountain, or wherever beverages are on sale, for either "Koke" or "Dope" is understood to be a specific and definite request for plaintiff's product, so intended by the purchaser using the word, or so understood by the dealer, and they deny that either the word "Koke," or the word "Dope," means now, or ever meant, plaintiff's product exclusively. [194] They deny that the word "Koke," or the word "Dope," now means, or ever meant, plaintiff's product at all. On the contrary, neither plaintiff nor any of its predecessors, or alleged predecessors in title, has ever at any time adopted or used either the word "Koke," or the word "Dope," in any manner, way, shape or form as a trademark, trade name or nickname for or designation of, its said product, or as an abbreviation of its alleged trademark "Coca-Cola." And neither it nor any of its predecessors, or alleged predecessors in title, has ever at any time authorized, recognized or countenanced the use of either of said words, "Koke" or "Dope" as a name for, or designation of, its said product. Neither plaintiff nor any of its predecessors, or alleged predecessors in title, has ever at any time affixed either of

said words "Koke" or "Dope" to its product, or to any packages or receptacles containing its said product, nor has it, or any of its alleged predecessors in title, ever advertised its said product in any manner, shape or form under either of said names "Koke" or "Dope" or ever applied either of said names "Koke" or "Dope" to its said product in any manner, shape or form, nor has it, or any of its predecessors, or alleged predecessors in title, ever done anything whatsoever to cause any one to apply either of said names "Koke" or "Dope" to its said product, or to ask for its said product by either of said names, nor has it done anything whatsoever to give either of said names "Koke" or "Dope" a value on the market. On the other hand, both before and since the bringing of this suit, plaintiff has constantly and habitually repudiated said words, as well as any and all other words, save and except the words "Coca-Cola," **[195]** as a trademark, trade name or nickname for, or designation of its said product, and has notified the public of this repudiation by extensive advertising and otherwise, and has warned the public, through its advertising and otherwise, that the only name it claims for its said product, the only name which identifies and distinguishes its product in the market, and the only name by which its product may rightfully be asked for, is the name "Coca-Cola." Respondents are advised and charge that even if plaintiff had ever in fact adopted or used either the word "Koke" or the word "Dope," as a trademark, trade name or nickname for, or designation of, its said product, or had ever acquired

the right to use either of said words in connection with its said product, as a name therefor, or designation thereof, that right thus acquired would have been lost and abandoned by reason of plaintiff's action in repudiating and abandoning said names, as aforesaid, and all other names or nicknames for its said product, except the name "Coca-Cola." Respondents are advised and charge that if plaintiff ever had any right to use either of said names, "Koke" or "Dope," or to object to the use of them by respondents, plaintiff has estopped itself, by its action in repudiating said names, and advising the public of that fact, from now asserting any such right.

III.

In answer to paragraph IV of the amended bill, respondents say:

That the alleged registration of plaintiff's alleged trademark name, "Coca-Cola," in the United States Patent Office, on the 3d day of January, 1893, and the certificate of registration issued therefor, dated January 31, 1893, are void and of no effect, because [196] respondents are informed and believe, and accordingly state the fact to be, that plaintiff secured the registration of said alleged trademark by fraud, in that neither plaintiff nor any of its predecessors, or alleged predecessors in title, up to that time had ever used the words "Coca-Cola" as a trademark for plaintiff's said product in commerce with any foreign nation, or with any of the Indian tribes.

IV.

In answer to paragraph V of the amended bill, respondents say:

They deny that either the word "Koke" or the word "Dope," considered either by itself or in combination with the dress of plaintiff's said product, "Coca-Cola," does now, or ever did, identify or distinguish plaintiff's said product or point exclusively to the plaintiff as the origin thereof.

V.

For answer to paragraph VI of the amended bill, respondents say:

They deny that either the word "Koke," or the word "Dope," is now, or ever was, a common and familiar abbreviation of plaintiff's alleged trademark name "Coca-Cola," and they deny that either of said words ever meant plaintiff's product exclusively.

VI.

For answer to paragraph VII of the amended bill, respondents say:

They deny that they and their privies in title adopted and began to use the names "Koke" and "Dope" as trademarks for their product after plaintiff's product had [197] become widely and favorably known under said names, and they deny that plaintiff's product is now, or ever was, widely or favorably known under either of said names. And they deny that either of said names does now, or ever did, identify or distinguish plaintiff's said product, or point exclusively to the plaintiff as the origin thereof. Respondents deny that they and their privies in title adopted and began to use said words "Koke" and "Dope" for the fraudulent purpose of enabling their goods to be passed off as and for plain-

tiff's product. Respondents deny that the color of plaintiff's product or the color of its barrels, or the character of dispensing bottles alleged to be furnished to dealers by plaintiff, is now, or ever was, distinctive, or does now, or ever did, identify or distinguish plaintiff's product or point exclusively to the plaintiff as the origin thereof; but, on the other hand, the color of plaintiff's said product, the color of its said barrels, and the character of its dispensing bottles, as aforesaid, are now, and have been common to the trade and in general use by the manufacturers of and dealers in similar beverages for many years and during the entire period of time that plaintiff and its predecessors, or alleged predecessors in title, have been manufacturing and selling plaintiff's product. Respondents deny that the labels with which their product is labeled are similar to the labels with which the plaintiff labels its said product.

VII.

In answer to paragraph VIII of the amended bill, respondents say:

They deny that they are, or that any of them is, engaged in any scheme or plan to pirate upon the reputation of plaintiff's product, or to pass off their goods [198] for plaintiff's good, or to enable dealers, dispensers or bottlers who purchase from them to pass off their product as and for plaintiff's product, either as an extract or syrup or as an aerated beverage.

VIII.

For answer to paragraph IX of the amended bill, respondents say:

They deny that they, or any of them, state to their customers that their syrup is made under the same syrup formula as that under which plaintiff's product is now made, or that their syrup is made by one who is acquainted therewith. It is true, however, that respondents do state at times to customers that their product is made under the direction of one who was formerly acquainted with the original formula under which Dr. Pemberton, the originator of Coca-Cola, made said product, and who had an interest in partnership with Dr. Pemberton in said formula and respondents aver that said statements are true. Respondents deny that they advise or instruct their agents, customers, and dealers in their product, to pass off the same as and for plaintiff's product, or that they countenance any such practice on the part of any of their agents, dealers or dispensers, and respondents deny that their agents, customers or dealers do in fact deceive buyers or purchasers of the same. Respondents deny that the use by them of either the word "Koke," or the word "Dope," or the manner in which they dress their product, has enabled anyone to pass off their product as and for plaintiff's product, or that any customers have been deceived or defrauded by reason thereof. [199]

IX.

For answer to paragraph X of the amended bill, respondents say:

It is true the Koke Company of America claims

to have secured and now to own, certain registrations in the United States Patent Office of the words "Koke" and "Dope" and that the respondents claim the right to use said names as licenses under the Koke Company of America. It is not true, however, that said registrations were secured in fraud of any rights of the plaintiff. It is true that the respondents, for the protection of said trademarks "Koke" and "Dope," have printed warnings on the cards of their traveling men, and on their stationery, to the effect that the Koke Company of America is the owner of said registrations of the words "Koke" and "Dope," in the United States Patent Office, and that any infringement of these registered trademarks will render the party infringing them amenable to prosecution; but it is not true that respondents have threatened persons selling plaintiff's product for the purpose of harassing them, or for the purpose of damaging or embarrassing plaintiff in its business. These statements were printed on the cards and stationery of the respondents for the purpose of protecting themselves against encroachments upon their rights by others, and as a notification to the trade of respondents' rights in the premises. Respondents believed at the time of printing said statements, and now believe in good faith, that said registrations are valid, and that respondents' licensor, the Koke Company of America, is the owner of said trademarks "Koke" and "Dope," and that said Koke Company of America and respondents are entitled to protection in the Courts of the United States

against infringement of them by plaintiff [200] or anyone else.

For further answer to said paragraph X of the amended bill, respondents say:

They have heretofore set up their chain of title to their trademark "Koke" in their answer to the original bill.

With respect to the trademark "Dope," respondents' title is as follows:

In about the year 1903, P. L. Houppert and Samuel H. Worcester, of Birmingham, Alabama, partners, doing business under the firm name and style of "Houppert & Worcester," having acquired a knowledge of the formula from which respondents' predecessors in title had theretofore manufactured their extract, syrup and beverage known as "Koke," began to manufacture, market and sell, in interstate commerce, an extract, syrup and beverage which were substantially identical with the extract, syrup and beverage theretofore manufactured and sold under the name of "Koke," by respondents' predecessors in title, and substantially identical with that which the respondents are now manufacturing and selling under the name of "Dope." At the date of the adoption of said trademark name "Dope," by the said partners, as aforesaid, it was in all respects new, original and distinctive, and had never before been used as a trademark or trade name for merchandise of the same descriptive properties, or of the same class. Thereafter, said partners, as the sole and exclusive owners of said trademark "Dope," continued to manufacture, market and sell in interstate com-

merce their said product under said trademark name "Dope," and to label the receptacles containing their said product with said trademark name, until about the 11th day of May, 1905. On or about said [201] date, said partners made an application, statement and verification, in due form, to the United States Patent Office for the registration of said trademark "Dope," as applied to their product. Thereafter, said partners, as the sole and exclusive owners of said trademark "Dope," continued to manufacture, market and sell, in interstate commerce, their said product under said trademark name, "Dope," in receptacles labeled with said trademark, until about the 6th day of June, 1905, when P. L. Houppert purchased from Samuel H. Worcester all his right, title and interest in and to said partnership business, and the goodwill thereof, including the formula for making said extract, syrup and beverage and the trademark "Dope," and all labels, receptacles, etc., used in connection therewith. Said instrument of conveyance was made in writing and duly recorded in the United States Patent Office, on or about the 6th day of June, 1905. Thereafter, the said P. L. Houppert became and continued to be the sole and exclusive owner of said business and the goodwill thereof, including said trademark name, "Dope," and the formula for making said product, and continued to manufacture, market and sell, in interstate commerce under the name and style of Houppert and Worcester, said same product under said trademark name "Dope," in receptacles labeled with said trademark name until he sold a one-half interest in said

business and goodwill and the formula for making said product, and the trademark "Dope" to E. J. Smiley, and formed the partnership of Houppert and Smiley. Thereafter the said partnership of Houppert and Smiley became and continued to be the sole and exclusive owners of said business and goodwill and of the trademark "Dope," etc., and began and continued to [202] manufacture, market and sell in interstate commerce said same product in receptacles labeled with said trademark until about the fourth day of June, 1907. On or about said date, the application aforesaid made on May 11, 1905, for the registration in the United States Patent Office of the said word "Dope," as a trademark for said product was duly granted and said name "Dope," was duly registered in the United States Patent Office as a trademark for said product, and a certificate of registration was, on or about that date, granted to the said Houppert & Worcester, under the name and style of "Houppert & Worcester." A copy of said certificate of registration is hereto attached and made a part of this answer, and marked for identification, Exhibit "A–1," to the same. Thereafter, the said Houppert & Smiley, as the sole and exclusive owners of said business and goodwill, including said trademark "Dope," and all registrations of the same in the United States Patent Office, continued to manufacture, market and sell, in interstate commerce, said same product under the trademark "Dope," in receptacles labeled with said trademark until the organization of the National Dope Company, a corporation, organized, chartered and

existing under and by virtue of the laws of the State of Alabama. Thereupon, said Houppert & Smiley, by an instrument in writing, for a valuable consideration, sold, assigned transferred and conveyed to the said National Dope Company all their right, title, claim and interest in and to said business and the goodwill thereof, including the formula for making said product, and the trademark "Dope" and all registrations thereof in the United States Patent Office. Thereafter, said National Dope Company became and continued to be the sole and exclusive owner of said business and goodwill and of said trademark [203] "Dope" and all registrations thereof in the United States Patent Office, and began and continued to manufacture, market and sell in interstate commerce said same product in receptacles labeled with the trademark "Dope" until the name of said corporation was changed to that of the Birmingham Bottling Company. Thereafter, said corporation continued, as the Birmingham Bottling Company, to be the sole and exclusive owners of said business and goodwill and of the trademark "Dope" and all registrations thereof in the United States Patent Office and continued to manufacture, market and sell in receptacles labeled with the trademark "Dope" until about the 6th day of May, 1913. On or about said date, said corporation, by instrument in writing, sold, assigned transferred and conveyed to S. T. Mayfield and J. C. Mayfield all their right, title, claim and interest in and to said business and the goodwill thereof, including the formula for making said product "Dope" and the trademark "Dope"

and all registrations thereof in the United States Patent Office. P. L. Houppert having died in the meantime, and A. E. Campbell and Frank Seiner of Birmingham, Ala., having been duly appointed by the Probate Court of Jefferson County, Alabama, as administrators of the Estate of P. L. Houppert, deceased, and having qualified as such administrators, and as such administrators, having succeeded to whatever right, title, claim or interest the said P. L. Houppert had in and to said business and the goodwill thereof, including the formula for making said product and the trademark "Dope" and all registrations thereof in the United States Patent Office. Said administrators, for a valuable consideration, by an instrument in writing, sold, assigned, transferred and conveyed to S. T. Mayfield and J. C. Mayfield, a partnership doing [204] business under the firm name and style of Mayfield & Mayfield, all right, title, claim and interest of the said P. L. Houppert, deceased, in and to said business and the goodwill thereof, including the formula for making said product, "Dope," and the trademark "Dope" and all registrations thereof in the United States Patent Office. Thereafter, the said S. T. Mayfield and James C. Mayfield, doing business under the firm name and style of "Mayfield & Mayfield," became and continued to be the sole and exclusive owners of said business and goodwill, and of said trademark, "Dope," and all registrations thereof in the United States Patent Office, and began and continued to manufacture, market and sell the extract, syrup and beverage made from said formula, in interstate com-

merce, under said trademark name, in receptacles labeled with said trademark, until about the 26th day of December, 1913, when they sold, assigned, transferred and conveyed unto the Koke Company of America, a corporation, organized, chartered and existing under and by virtue of the laws of the State of Arizona, all their right, title and interest in and to said business and the goodwill thereof, including said trademark "Dope," and all registrations thereof in the United States Patent Office, as well as the formula for making said product. Thereafter, said Koke Company of America became and continued to be the sole and exclusive owner of said business, and the goodwill thereof, and of said trademark "Dope," and all registrations thereof in the United States Patent Office, and of the formula for making said product and began and continued to manufacture, market and sell, in interstate commerce, said same product under said trademark name "Dope" in receptacles labeled with said trademark [205] name, "Dope," until the bringing of this suit, and is now manufacturing, marketing and selling said product, in interstate commerce, under said trademark name, in receptacles labeled with said trademark name, and now owns and conducts said business, and is now the owner of said business and goodwill and the formula for making said product, and said trademark name, and now owns and conducts said business, and is now the owner of said business and goodwill and the formula for making said product, and said trademark name "Dope," and all registrations thereof in the United States Patent Office.

On or about the 30th day of December, 1913, said Koke Company of America duly granted to the respondent, Southern Koke Company, Ltd., a corporation, organized, chartered and existing under and by virtue of the laws of the State of Arizona, an exclusive license to sell said product, "Dope," in the State of Louisiana, and elsewhere, and to use said trademark "Dope," in connection therewith, and respondents were marketing and selling said product at the time this suit was brought, and have been marketing and selling since that time said product under said trademark name, "Dope," by virtue of the authority granted it under said exclusive license from the Koke Company of America.

X.

Respondents, for further answer, say that the plaintiff comes into Court with unclean hands, and should be repelled and denied any relief, because of its own vicious, unfair competition with respondents. Respondents are advised and believe, and accordingly state the fact to be, that the plaintiff now has and maintains, and for sometime past has had and maintained, a large force of [206] detectives, "investigators," law agents and others agents, and that this force has been for sometime past, and is now, kept constantly in the field and on the road, for the purpose of driving respondents from the field of competition, destroying their business and establishing a monopoly. These detectives and agents, under the authority and by direction of the plaintiff, constantly maintain a despicable system of espionage over respondents and their customers, whereby they

and the soft drink trade generally are constantly shadowed and kept under surveillance, and their innermost business secrets and affairs are deliberately and stealthily pried into. By these means, the plaintiff acquires, and has acquired, a knowledge of the condition and affairs of the respondents, the names of their customers, the extent of their business and resources, and the plaintiff has, since said time used and is now using this information unfairly in an attempt to crush respondents. The plaintiff, through its said corps of detectives and agents, and through its competitor's customers, including the customers of respondents, of the beverage they are handling, the quantity thereof, and the manufacturers from whom they purchase the same. Plaintiff's said agents and detectives, acting under its authority and by its direction, go, and have gone, to the respondents' customers and slander and have slandered respondents' business, falsely representing to said customers that the respondents' business is dishonest and fraudulent, and that respondents' products, "Koke" and "Dope," are dishonest and fraudulent products, and only substitutes for plaintiff's product, "Coca-Cola," and that they were designed, [207] by respondents only to be sold as and for plaintiff's said product, "Coca-Cola," and that if the customers persist in handling respondents' product they will be themselves engaging in a dishonest business, and participating in and practicing a fraud upon the public; that no one has a right to manufacture and sell a syrup, extract or beverage similar in color, taste and constituency to plaintiff's

product, "Coca-Cola," except the plaintiff and those acting by and under its authority, and that any one handling any other similar products, especially respondents' product, renders himself amenable to suit at the hands of the plaintiff in the Courts of the United States. And said agents and detectives have threatened, and continue to threaten, respondents' dealers and customers with suits for alleged trade-mark infringement and unfair competition in the Courts of the United States, if they continue to handle respondents' product and do not immediately agree to quit handling respondents' product, and never again to handle any similar product, in competition with plaintiff's said product. And plaintiff's said agents and detectives, for the sole purpose of harassing, annoying and intimidating respondents' customers, and the trade generally, and of destroying respondents' business, stifling competition and creating a monopoly, have told and continued to tell respondents' customers and the trade generally that the plaintiff has set aside an enormous sum of money for the purpose of prosecuting those who handle respondents' products, and that whether said dealers and customers now agree to quit handling respondents' product or not, in the end they will be forced to give in and handle plaintiff's product [208] exclusively, or be financially ruined, as it would be a useless undertaking for them to attempt to match strength with the plaintiff's tremendous wealth, power and influence. And for the purpose of harassing, annoying and intimidating respondents' customers and the trade generally, and coercing them

to quit handling respondents' product and to handle plaintiff's product, exclusively, plaintiff's said agents have informed them of its said system of espionage, and have notified them that if they handle or sell any other syrup or beverage in competition with plaintiff's product, plaintiff's detectives would soon find it out through its spy system, and that plaintiff would then visit them with prosecutions in the Courts, or else decline longer to sell them its product, and thus destroy such trade as they may have had with customers who happen to desire plaintiff's product in preference to other similar products. Plaintiff has also threatened to discontinue its advertising on the walls of buildings owned or leased by customers, and thus cut off their revenue from these advertisements, if they did not quit handling and selling respondents' product, and sign an agreement not to handle any other similar product in competition with plaintiff's product, and plaintiff has threatened the trade with this punishment if they should have the temerity to begin to handle and sell respondents' products, or any product similar to plaintiff's said product. And plaintiff has sent its local attorneys to respondents' customers, to officially advise them that if they persisted in handling respondents' products, or begin to handle them, they will be subject to suit at the hands of plaintiff, and [209] said attorneys have so advised respondents' customers and the trade generally, and have endeavored to scare them into refusing to handle respondents' products in the future, and to intimidate them into signing a contract to handle plaintiff's product

exclusively. Said attorneys have threatened to bring suit against respondents' customers if they did not comply immediately with the plaintiff's demands, and in order to further coerce and intimidate them, have falsely told them that plaintiff's corps of detectives had secured a mass of convincing evidence, proving conclusively that the clerks of said customers' had been substituting respondents' product as and for plaintiff's product, etc., and that they had better give in rather than run the risk of being defeated in a law-suit, or of incurring the disfavor of the plaintiff. In cases where respondents' customers have refused to be coerced or intimidated by any of these means, plaintiff has filed suit against them in the Federal Courts for alleged unfair competition and trademark infringement. A number of these suits have been filed against respondents' dealers and customers in different parts of the country, not in good faith, or for the protection of any rights of the plaintiff, but simply and solely for the effect they will have upon the trade, and to further harass, annoy, coerce and intimidate respondents' customers and the trade, and thus destroy respondents' business. Although one of these suits has been tried out on its merits and properly dismissed at the plaintiff's cost, plaintiff still continues [210] to prosecute other customers of the respondents, and still continues to unlawfully harass, annoy, coerce and intimidate respondents' dealers and customers. By these and divers other means, the plaintiff, acting through its said corps of detectives and agents, and otherwise, has annoyed, harassed, threatened, in-

timidated, coerced and browbeaten the customers of the respondents into signing a contract with the plaintiff, agreeing not to handle any other product in competition with plaintiff's product, and has forced them to quit handling respondents' product, and by these unfair and vicious means the plaintiff has damaged respondents' business and destroyed a large part of their trade. Not only has plaintiff threatened to boycott respondents' customers if they did not quit handling respondents' product, and threatened to boycott others if they should begin to handle respondents' product, but the plaintiff has so uniformly and habitually carried out its threat not to sell its product, to any customer or dealer who handles respondents' product, or any other similar product, in competition with plaintiff's product, and its other threats, and this has been done so notoriously for the sole purpose of destroying respondents' trade, and the trade of plaintiff's competitors, and for the unfair and vicious purpose of coercing respondents' customers and the trade generally into handling plaintiff's product exclusively, and thereby creating and fostering a monopoly; that the trade throughout the country has become afraid to handle any similar product in competition with plaintiff's product, through fear of the consequences of incurring plaintiff's disfavor, and of being visited with the execution of plaintiff's said [211] threats.

Plaintiff has stationed its agents in front of soda-fountains that were known to be handling respondents' product, and these agents, acting under the authority and by the direction of the plaintiff, have

told the consuming public entering these establishments that plaintiff's product was not on sale there but that the respondents' was, and have falsely told them that respondents' said product was a vile substitute for plaintiff's product, and a cheap imitation thereof, made out of inferior materials, etc., and warned them not to drink it.

On other occasions, when plaintiff's said agents have failed in their efforts to destroy respondents' trade by means of the harassment, intimidations, threats, coercion, etc., heretofore referred to, they have deliberately picked fights with respondents' customers, and then beaten them up with their fists, in retaliation for their refusal to quit handling respondents' product, and for their refusal to sign a contract to handle plaintiff's product exclusively, and this has been done with the knowledge and approval of the plaintiff, and connived at by it, if not done under its express direction.

Notwithstanding the fact that the respondents, The Southern Koke Company, Ltd., and the Koke Company of Texas, are corporations incorporated only under the laws of the State of Arizona, and notwithstanding the fact that their licensor, The Koke Company of America, is a corporation, also chartered only under the laws of the State of Arizona, so that the plaintiff could have sued the Koke Company of America [212] and its licensees, selling by and under its authority, in one suit in the United States District Court for the District of Arizona and obtained full adequate and complete relief in that Court, if entitled to relief; nevertheless, in order to

annoy, harass and embarrass respondents and for the sole purpose of visiting them with a multiplicity of suits and all the annoyance, expense and inconvenience incident thereto, plaintiff brought suit against the Southern Koke Company, Ltd., in the United States District Court at New Orleans, and entered another suit against the Koke Company of Texas, in the United States District Court at Dallas, and another suit against the Koke Company of America in the United States District Court at St. Louis, and then brought this suit against all of said companies in this Court, all of said suits being based upon the same identical alleged cause of action.

As a result of all of these tactics, and as a result of plaintiff's system of espionage, respondents' customers, and the trade generally, have been harassed, annoyed, intimidated, coerced and terrorized by the plaintiff to such an extent that a great many of respondents' dealers have finally decided to quit handling respondents' product and any other similar products, and to handle plaintiff's product exclusively as the easiest and cheapest way to avoid any further such treatment, and the trade generally is afraid to handle respondents' product, for fear of being subjected to similar treatment.

Respondents deny each and every allegation in said amended bill of complaint not hereinbefore expressly **[213]** admitted, denied or explained, and now having fully answered, pray to be hence dismissed.

THE KOKE COMPANY OF AMERICA,
[Corporate Seal] By J. C. MAYFIELD,
President.

THE SOUTHERN KOKE COMPANY, LTD.,
[Corporate Seal] By J. C. MAYFIELD,
President.

THE KOKE COMPANY OF TEXAS,
By ————————,
Attorney.

THE KOKE COMPANY OF ARKANSAS,
By ————————,
Attorney.

THE KOKE COMPANY OF OKLAHOMA,
By ————————,
Attorney.

RICHARD E. SLOAN,
JAMES WESTERVELT,
LITTLETON, LITTLETON & LITTLETON,
Solicitors for Respondents. [214]

State of Louisiana,
Parish of Orleans.

J. C. Mayfield, being duly sworn, deposes and says that he is president of the Koke Company of America and of the Southern Koke Company, Ltd., two of the respondents herein; that the said Koke Company of America and Southern Koke Company, Ltd., are corporations, and affiant makes this affidavit in verification for them and in their behalf, and is duly authorized so to do; that he has read the above and

foregoing answer and knows the content thereof, and that the same is true to the best of his knowledge, information and belief.

J. C. MAYFIELD.

Sworn to and subscribed before me, this 18 day of March, A. D. 1915.

[Notarial Seal] EDW. RIGHTOR,
Notary Public. [215]

Exhibit "A-1" Attached to Answer to Amended Bill of Complaint—Certificate of Registration of Trademark.

(COPY)

No. 63,033.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents shall Come:

This is to certify that by the records of the UNITED STATES PATENT OFFICE it appears that Houppert & Worcester, of Birmingham, Alabama, did, on the 11th day of May, 1905, duly file in said Office an application for REGISTRATION of a certain

TRADEMARK

for a Carbonated Beverage, that they duly filed therewith a drawing of the said TRADEMARK, a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and have duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the COMMISSIONER OF PATENTS.

And, upon due examination thereof, it appearing that the said applicants are entitled to registration

of their said TRADEMARK under the law, the said TRADEMARK has been duly registered to Houppert & Worcester, and their successors or assigns, in the UNITED STATES PATENT OFFICE, this 4th day of June, 1907.

This certificate shall remain in force for TWENTY YEARS, unless sooner terminated by law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed, at the City of Washington, this fourth day of June in the year of our Lord, one thousand, nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal] (Signed) E. B. MOORE,
Commissioner of Patents. [216]

TRADEMARK.

No. 63,033. Registered June 4, 1907.

HOUPPERT & WORCESTER,
A CARBONATED BEVERAGE.
Application Filed May 11, 1905.
Proprietor:

HOUPPERT & WORCESTER
Per
ARTHUR E. WALLACE,
Attorney. [217]

UNITED STATES PATENT OFFICE.

HOUPPERT & WORCESTER, OF BIRMINGHAM, ALABAMA.

TRADE-MARK FOR A CARBONATED BEVERAGE.

No. 63,033. Statement and Declaration. Application filed May 11, 1905. Registered June 4, 1907. Serial No. 5,197.

STATEMENT.

To all whom it may concern:

Be it known that we, HOUPPERT & WORCESTER, a firm domiciled in the City of Birmingham, County of Jefferson, and State of Alabama, and doing business at Avenue C and Twenty-second street, in said City, and composed of the following members, SAM H. WORCESTER and P. L. HOUPPERT, citizens of the United States, have adopted for our use the trade-mark shown in the accompanying drawing.

This trade-mark has been continuously used by us in our business since the year A. D. 1903.

The class of merchandise to which this trade-mark is and has been appropriated in Class 46, Beverages, non-alcoholic, and the particular description of goods comprised in said class to which the said trade-mark is appropriated is a carbonated beverage.

The trade-mark is usually displayed on the packages containing the goods by printing the same on labels which are affixed to bottles containing the goods.

HOUPPERT & WORCESTER,
By SAM H. WORCESTER,
A member of the firm.

DECLARATION.

State of Alabama,
County of Jefferson, ss.

Sam H. Worcester being duly sworn deposes and says that he is a member of the firm of Houppert & Worcester of Birmingham, Alabama, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that he believes the said firm is the owner of the trade-mark sought to be registered, that no other person, firm, corporation, or association to the best of his knowledge and belief has the right to use said trade-mark, either in the identical form or in such near resemblance thereto as might be calulated to deceive; that such trade-mark is used by the said firm in commerce among the several states of the United States and that the description, drawing and specimens presented for record truly represent the trade-mark sought to be registered.

SAM H. WORCESTER.

Subscribed and sworn to before me, a notary public within and for said County and State, this 4th day of May, 1905.

[L. S.] W. H. MOORE,
Notary Public.

[Endorsements]: In the District Court of the United States for the District of Arizona. Coca-Cola Company v. Koke Company of America et al. Answer to Amended Bill of Complaint. Sloan & Westervelt, Fleming Bldg., Phoenix, Arizona, Attorneys for Defendants. Due service of the within answer is hereby accepted this 2d day of April, 1915. J. E. Morrison, per C. E. John, Atty. for Plaintiff. Filed Apr. 2, 1915, at —— M. George W. Lewis, Clerk. By Aileen Russell, Deputy. [219]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Tuesday, April 6, 1915.

By the consent of the counsel for both the plaintiff and the defendant, IT IS ORDERED that this case be set down for trial at Prescott on August 2, 1915, the plaintiff appearing by J. E. Morrison, Esq., its attorney, and the defendant by Richard E. Sloan, Esquire, its attorney. [220]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Monday, August 2, 1915.

This case came on this day regularly for trial at Prescott, State and District of Arizona, it being stipulated by counsel in open court that this case may be heard and tried at Prescott as a Phoenix case. Come now the plaintiff by its counsel, J. E. Morrison, Esquire, and the defendants by their counsel, R. E. Sloan, Esquire, A. B. Littleton, Esquire, and W. F. Norman, Esquire, into open court and both parties announce themselves ready for trial. D. A. Little is duly sworn as Court Reporter in this case. J. E. Morrison, Esquire, then reads aloud plaintiff's amended complaint. A. B. Littleton, Esquire, then reads aloud the defendants' answer. The hour for adjournment having arrived and the trial of this case not having been completed, it is ordered that the further trial of this case be and the same is hereby continued until Tuesday, the 3d day of August, A. D., 1915, at ten o'clock A. M. [221]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Tuesday, August 3, 1915.

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, all counsel for both parties being present in open court, D. A. Littleton, Esquire, reads aloud the amended answer of the defendants. Edward S. Rogers, Esquire, makes a brief statement on behalf of the plaintiff and the plaintiff, than to maintain upon its part the issues herein, offers in evidence, depositions of witnesses taken on its behalf, marked Nos. 1, 2, 3, 4, 5 and 6 and Exhibits Nos. 1 to 231, inclusive, which are admitted and filed and treated as read in evidence and called as witnesses, C. A. Meserve and J. J. Kessler, who are duly sworn, examined and cross-examined. Defendants exhibits 232 to 268 inclusive, are offered in evidence, admitted and filed. The hour for adjournment having arrived and the trial of this case not having been completed, it is ordered that the further trial of this case be and the same is hereby continued until Wednesday, the 4th day of August, 1915, at ten o'clock A. M. [222]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Wednesday, August 4, 1915.

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, all counsel for both parties being present in open court, J. J. Kessler is called to the stand for further examination in chief and cross-examination. Defendants' Exhibits 269 and 274, inclusive, are offered in evidence, admitted and filed. The hour for adjournment having arrived and the trial of this case not having been completed, it is ordered that the further trial of this case be and the same is hereby continued until Thursday, the 5th day of August, A. D. 1915, at the hour of ten o'clock A. M. [223]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Thursday, August 5, 1915.

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, all counsel for both parties being present in open court. By agreement of counsel, the further trial of this case is continued until Friday, the 6th day of August, A. D. 1915, at the hour of ten o'clock A. M., on account of the absence of a material witness for the defendants who is on his way and expected here today, but who has not yet arrived. [224]

In the United States District Court for the District of Arizona.

No. E—21 (PHX.).

Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Made Under Date of Friday, August 6, 1915, at Prescott, Arizona.

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, all counsel for both sides being present in open court. The defendants to further maintain upon their part the issues herein, call as witness, Wm. Simonson, who is

duly sworn, examined and cross-examined, and offer in evidence exhibits Nos. 275 to 280, inclusive, which are admitted and filed; and thereupon the defendants rest.

Plaintiff then offer in evidence the depositions of N. M. Leaver, John H. Bolins, Herbert G. Marvel, Maurice Wolf, Ernest Higgin and Henry Hartman, and three volumes bound in brown, being testimony taken in rebuttal by plaintiff, which are admitted. The testimony of J. C. Mayfield taken at Chattanooga on July 5th, 1915, is offered as cross-examination by the plaintiff, to which defendants [225] except.

The defendants then move the Court to amend paragraph 24 on page 26 of defendants' answer by adding thereto as follows: "(D) And in that plaintiff's said product, in violation of the Act of Congress of December 17th, 1914, known as the Drug Act, contains a compound or preparation of Coca leaves, which contains cocaine, and plaintiff manufactures and sells its said product, so containing cocaine, to be used as a popular beverage, and which is used as a popular beverage, and not in compliance with the requirements of said act," which motion is allowed by the Court and the defendants given leave to amend their answer as aforesaid. Upon application of defendants showing to the Court that they have not had an opportunity to examine the depositions recently taken by the complainants and for other good cause,

IT IS ORDERED that this case be continued until Monday, the 16th day of August, A. D. 1915, at the hour of ten o'clock A. M., at which time arguments by respective counsel will be had. [226]

In the United States District Court for the District of Arizona.

COCA-COLA CO.,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Monday, August 16, 1915.

Pursuant to an order of continuance made on August 6, 1915, trial of this case is this day resumed, counsel for both sides being present in open court. Argument upon behalf of the plaintiff is made by Edward S. Rogers, Esquire. Argument upon behalf of the defendants is commenced by A. B. Littleton, Esquire. The hour of adjournment having arrived and the trial of this case not being completed, it is ordered that the further trial of this case be continued until Tuesday, the 17th day of August, A. D. 1915, at the hour of ten o'clock A. M. [227]

In the United States District Court for the District of Arizona.

COCA-COLA CO.,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Tuesday, August 17, 1915.

Pursuant to an order of adjournment made on yesterday, trial of this case is this day resumed, counsel for both sides being present in open court. Argument commenced on yesterday by A. B. Littleton, Esquire, upon behalf of the defendants, is this day resumed and completed. R. E. Sloan, Esquire, commences argument of the case upon behalf of the defendants, but the hour of adjournment having arrived and the trial hereof not being completed, it is ordered that the further trial of the case be adjourned and continued until Wednesday, the 18th day of August, A. D. 1915, at the hour of ten o'clock A. M. [228]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA,

Defendants.

Minute Entry Appearing Under Date of Wednesday, August 18, 1915.

Pursuant to an order of continuance made on yesterday, trial of this case is this day resumed, all counsel for both sides being present in open court. Argument is continued on behalf of the defendant by Richard E. Sloan, Esquire, and on behalf of the plaintiff

by J. E. Morrison, Esquire. The hour of adjournment having arrived and the trial of the case not being completed, it is ordered that the further trial hereof be adjourned and continued until Thursday, the 19th day of August, A. D. 1915, at the hour of ten o'clock A. M. [229]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Thursday, August 19, 1915.

Pursuant to an order of adjournment made on yesterday, trial of this case is this day resumed, all counsel for both sides being present in open court. Argument upon behalf of the plaintiff is had by Harold Hirsch, Esquire. The hour of adjournment having arrived and the trial of the case not being completed, it is ordered that the further trial hereof be adjourned and continued until Friday, the 20th day of August, A. D. 1915, at the hour of ten o'clock A. M. [230]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Friday, August 20, 1915.

Pursuant to an order of continuance made on yesterday, trial of this case is this day resumed, all counsel for both sides being present in open court, except Messrs. Rogers and Hirsch, who were excused from further attendance owing to the fact that they had previously made arrangements to join their wives at Grand Canyon. The argument of the plaintiffs in reply to the argument of the defendants, by consent of Court, was replied to by A. B. Littleton, Esquire, and R. E. Sloan, Esquire, on behalf of the defendants, and the case submitted to the Court upon the oral argument and briefs that have been filed and taken under consideration by the Court. **[231]**

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.

Defendants.

Minute Entry Appearing Under Date of Monday, August 23, 1915.

IT IS ORDERED by the Court that the two large folders containing the exhibits of the defendants in this case be deposited by the clerk in the vault of the Arizona National Bank of this city, subject to the order of this Court. [232]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Saturday, September 11, 1915.

Comes now the plaintiff by R. E. Morrison, Esquire, and asks leave of the Court to withdraw from the files of the clerk Plaintiff's Exhibits Nos. 1 to 50, inclusive, and said request is granted and it is so ordered, such exhibits to be returned to the Clerk on or before the 20th day of October, A. D. 1915, at Phoenix, Arizona. [233]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Monday, September 13, 1915.

Comes now the plaintiff by J. E. Morrison, Esquire and asks leave of the Court to withdraw from the files of the Court Plaintiff's Exhibits Nos. 114, 115, 116, 117, 118, 120, 121, 122, 154, 155, 156, 157, 158, 159, and 160 and said request is ordered granted by the Court, such exhibits to be returned to files of this case at Phoenix, Arizona, on or before October 20, 1915. [234]

In the United States District Court for the District of Arizona.

COCA-COLA CO.,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Thursday, April 20, 1916.

This case having been heard and submitted, IT IS ORDERED that same be continued under advisement. [235]

In the United States District Court for the District of Arizona.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Thursday, July 6, 1916.

IT IS ORDERED by the Court that a decree be entered herein in favor of the plaintiff and that counsel for the plaintiff prepare same in accordance with the provisions of the opinion of the Court this day filed herein. **[236]**

In the United States District Court for the District of Arizona.

IN EQUITY (PHOENIX).

E—21 (PHX.).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF ARKANSAS, THE KOKE COMPANY OF OKLAHOMA,

Defendants.

Opinion.

HAROLD HIRSCH, of Atlanta, Georgia, EDWARD S. ROGERS, of Chicago, Illinois, and JOSEPH E. MORRISON, of Phoenix, Arizona, Solicitors for Complainant.

FRANK F. REED, CANDLER, THOMSON & HIRSCH, of Counsel.

RICHARD E. SLOAN, of Phoenix, Arizona, JAMES W. WESTERVELT, of Phoenix, Arizona, and ANGUSTINE B. LITTLETON, of Chattanooga, Tennessee, for Defendants.

LITTLETON, LITTLETON & LITTLETON, Chattanooga, Tennessee, of Counsel.

SAWTELLE, District Judge:

The bill in this case seeks relief by injunction both preliminary and perpetual, against the defendants because of their joint and several infringement of the plaintiff's trademark—"Coca-Cola"—and for unfair competition on their part. It also asks an accounting of the profits received by defendants, and the assessment of damages sustained by plaintiff. [237]

The material allegations of the bill, so far as they are necessary to be set forth for the determination of the issues made, are as follows:

The first section of the bill recites the initial manufacture of the syrup known as "Coca-Cola" by J. S. Pemberton, in the year 1886, and traces the title through its various transfers into the plaintiff company on February 22, 1892.

It is alleged that the process and formula for the manufacture of the beverage and syrup styled "Coca-Cola" was new and original and was invented and discovered by plaintiff and its predecessors as a trade and business formula, process and secret, and is now a secret formula and process and not known to the public or others than the plaintiff and its officers and employees and the predecessors of plaintiff.

The second section of the bill charges the continued manufacture of syrup made under the Pemberton formula; alleges that the trademark "Coca-Cola" was, at the time of its adoption by the predecessors of plaintiff, characteristic and distinctive and had never before been used by any one, and has continuously been used for the purpose of distinguishing the product of plaintiff and its predecessors from the similar product of others, and that said trademark does now identity and distinguish plaintiff's product. It is further charged that plaintiff's product has been given by the purchasers and consumers thereof certain nicknames, to wit: [238] "Koke" and "Dope," and that each of these words are now and for many years past and prior to the application of either of them to any other beverage recognized and commonly and familiarly used as nicknames for Coca-Cola, and that a request for either is understood, both by the seller and the purchaser, to be a specific and definite request for Coca-Cola and has been so understood and regarded, and acted on both by the seller and purchaser, for many years prior to the manufacture or sale of any other preparation under either of said names; and that at the present

time both dispensers and consumers use these words as a descriptive of the product of plaintiff, and for no other beverage.

The third section of the bill alleges the application to the patent office for the registration of the words "Coca-Cola" as a trademark on May 14, 1892, and the allowance of said application on January 31, 1893, and the issuance of a certificate of registration on that day, which is alleged to be in full force and wholly unrevoked and uncancelled. It is also alleged that on April 23, 1905, under and by virtue of the act of Congress of February 20, 1905, the plaintiff duly applied to the Patent Office of the United States for the registration of the said trademark "Coca-Cola," and complied in all respects with said act and the regulations of the Commissioner of Patents, and thereupon the registration of said trademark "Coca-Cola" was duly allowed for tonic beverages and syrups for the manufacture of such beverages [239] and a certificate of registration No. 47,189, was duly granted to the plaintiff on October 31, 1905, and is still in full force and effect, and that plaintiff is entitled to the sole and exclusive right, both generally and in interstate commerce, to use and employ said trademark on its goods.

The fourth section of the bill alleges the sale of both the syrup and of an aerated beverage, permitted to be manufactured from the syrup by certain licenses of plaintiff, under the trade name, in distinctive receptacles, bottles and barrels and labels, all of which were adopted by plaintiff for the purpose of distinguishing the product of plaintiff from that of other

manufacturers in the same lines.

The fifth paragraph sets up that the plaintiff has expended much time, labor and money in advertising its product. It is alleged that the Koke Company of America was organized under the laws of the State of Arizona about September 15, 1911, and thereafter proceeded in the city of St. Louis to manufacture an unnecessary and deliberate imitation of plaintiff's Coca-Cola syrup, but different therefrom and greatly inferior thereto, and placed the same in barrels and packages similar to those of plaintiff. That said extract is designated by the defendants sometimes as "Koke," and sometimes as "Dope"; that the Koke Company of America ships said imitative extract from the city of St. Louis, usually under the name of "Koke," to the other [240] defendants, and that said extract is used by said defendants as a basis for making a syrup for sale to soda-fountains and bottles which resemble the articles produced by plaintiff, and that the defendants, as a matter of fact, do sell, substitute, and palm off the said syrup and extract as and for the Coca-Cola products of plaintiff. It is alleged that the said imitation product is, with the consent of defendants, sold to the public in substitution for genuine Coca-Cola. It is further charged that the defendants adopted the words "Koke" and "Dope" as a name for their product many years after the words were commonly used to describe the plaintiff's product, and that said adoption was a means to enable them to substitute their product for that of the plaintiff and to reap the benefit of its advertising and labor in dispensing and selling said product.

It is also alleged that the defendants stated, both to bottlers and dispensers, that the syrup they made was produced under the same formula as Coco-Cola, and instructed both dispensers and bottlers to substitute their product when the purchaser desired and intended to obtain Coca-Cola.

It is further alleged that the registration in the patent office of the words "Koke" and "Dope" claimed by defendants was in fraud of the rights of plaintiff, and that the defendants threaten to sue dealers and dispensers who deliver Coca-Cola when "Koke" and "Dope" are called for and when both the dispenser and purchaser design to sell and receive Coca-Cola. [241]

The answer denies all the material allegations of the bill, and after setting up the manner of acquiring title to the trade names "Koke" and "Dope," deny that, at the time they were adopted by their predecessors, they were generally used as a synonym or nickname of plaintiff's product.

The answer then alleges that the plaintiff has been and is now engaged in establishing a monopoly, and that the business of defendants and their patrons is being subjected to a system of espionage by plaintiff and its officers and agents, and agents are using the information thus acquired to impede and harass the customers of defendants, representing that the business of defendants is fraudulent and dishonest and its product inferior imitations of Coca-Cola, and threatening prosecutions if defendants' products are dealt in by its customers.

The answer then alleges that by reason of these

representations and threats many of its customers have ceased to deal in its product, to its damage. It is also contended in the answer that the name "Coca-Cola" was deceptive as a trademark and for that reason was fraudulent, and was but a descriptive name for a product which the plaintiff does not now produce.

Numerous authorities have been cited by both sides, with varient facts, but as each case must be determined on all the facts that surround it, the facts in any prior case cannot be a guide to the decision of the subsequent. This [242] view is cogently pointed out on page three of lectures of John Cutler, of King's College, entitled "Passing Off."

The fundamental principle of the law applicable to this class of cases is well established. It may be thus stated: "No man has a right to pass off his goods as though they were the goods of another."

> "The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another."
>
> Canal Company v. Clark, 13 Wall. 311.

The difficulties which arose are in the application of this principle to the facts of the particular case, and the question which the Court has to decide is always a question of fact. The decision of the Court depends upon all the circumstances affecting the plaintiff and his trade and the circumstances affecting the defendant and his trade, and both alike must be considered in arriving at a conclusion. I quote from a few of the leading cases both English and American.

In the case of Burgess v. Burgess, 3 DeG. M. & G. 896, Lord Justice Turner said:

> "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another."

In the case of Reddaway v. Banham, A. C. 199, 13 R. P. C. 224, the Lord Chancellor said:

> "My lords, I believe that this case turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your Lordships have been engaged, that it is sometimes [243] difficult when examining former decisions to disentangle what is decided as fact, and what is laid down as a principle of law. For myself I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else.
>
> How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case, must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof, but if the proof establishes the fact the legal consequence appears to follow."

In a later case in the House of Lords, referring to

Burgess v. Burgess, the Lord Chancellor made this statement:

"The proposition of law is one which, I think, has been accepted by the highest judicial authority, and acted upon for a great number of years. It is that of Lord Justice Turner, who says, in terms: 'No man can have any right to represent his goods as the goods of another person. In the application of this kind, it must be made out that the defendant is selling his own goods as the goods of another.' That is the only question of law which, as it appears to me, can arise in these cases. All the rest are questions of fact. The most obvious way in which a man would be infringing the rule laid down by Lord Justice Turner is if he were to say in terms, 'These are the goods manufactured by' a rival tradesman; and it seems to be assumed that unless he says something equivalent to that no action will lie. It appears to me that that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter that same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle or the form of the label, or the nature of the thing sold in the package, he is making the statement not in express words, but in one of those different forms in which the statement can be made by something that he knows will be so

understood by the public. In each case it comes to be a question whether or not there is the statement made; and if the statement is made, there can be no doubt of the legal conclusion that he must be restrained from representing that the goods that he makes are the goods of the rival tradesman. Then you get back to the proposition which I have read from Lord Justice Turner."

Powell v. Birmingham Vinegar Co., A. C. 710; 44 R. P. C. 727. [244]

"In all cases where rights to the exclusive right of a trademark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities."

Canal Co. v. Clark, 13 Wall. 311, 322.

"Equity gives relief in such a case, upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacturer of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other

manufacturer, whose reputation is not so high as a manufacturer. Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp; because, by doing so, he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would or might be depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy. Seixo v. Probezende, Law Rep. 1 Ch., 195."

McLean v. Gleming, 96 U. S. 245, 251.

"The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trademark must therefore be distinctive in its original signification, pointing to the origin of

the article, or it must have become such by association."

Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S. 537, 546. [245]

"Every one has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such a fraud by the use of descriptive and geographical terms which are not susceptible of monopolization as trademarks as effectually as it prohibits its commission by the use of any other expressions."

Shaver v. Heller & Merz Co., 108 Fed. 821, 827.

"No person other than the owner of a trademark has a right, without the consent of such owner, to use the same on like articles, because by so doing he would in substance falsely represent to the public that his goods were of the manufacture or selection of the owner of the trademark, and thereby would or might deprive the latter of the profit he otherwise might make by the sale of the goods which the purchaser intended to buy. Where a trademark is infringed

the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is on this ground that a court of equity protects trademarks. It is not necessary that a trademark should on its face show the origin, manufacture or ownership of the articles to which it is applied. It is sufficient that by association with such articles in trade it has acquired with the public an understood reference to such origin, &c. This doctrine has repeatedly been declared by the Supreme Court, Canal Co. v. Clark, 13 Wall. 311, 323; Manufacturing Co. v. Trainer, 101 U. S. 5154; Medicine Co. v. Wood, 108 U. S. 218, 223, 2 Sup. Ct. 436; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143; Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 603, 9 Sup. Ct. 166; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 456, 11 Sup. Ct. 396; Mill Co. v. Alcorn, 150 U. S. 460, 462, 14 Sup. Ct. 151."

Dennison v. Thomas, 94 Fed. 651, 656.

I think it has been established by the evidence in this case that the plaintiff is the owner of and alone entitled to use the trademark "Coca-Cola" and that its goods alone can lawfully be sold under that name. **[246]**

It is insisted by the defendants that the words "Coca-Cola" are a mere description of a product, and that it does not describe the product of plaintiff, and consequently does not constitute a valid trademark. This contention was considered in the case of

Coca-Cola Company v. Nashville Syrup Company, 215 Fed. 527, and was there decided adversely to such contention. I think that decision is decisive of the question.

The question of the validity of the trademark "Coca-Cola" and the right of plaintiff to its exclusive use since its registration under the Act of Congress of February 20, 1905, would seem to be placed beyond the pale of contention by the case of Coca-Cola Company v. Deacon Brown Bottling Company, 200 Fed. 105.

I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendants, Koke Company of America and its predecessors, did not adopt or make use of the name "Koke" until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff. Parker v. Stebler, 177 Fed. 210, 9th Circuit. **[247]** The Barbed Wire Patent, 143 U. S. 275; Deering v. Winona Harvester Works, 155 U. S. 286.

I am convinced that when the witness Mayfield adopted the name "Koke," he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Com-

pany. I further find that the purchase of the trademark "Koke" from the Murphreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

It may be that these resemblances standing alone would not in themselves justify any relief against a person using them in good faith, but when considered in the light of all the evidence in this case, I cannot reconcile them with fairness. The opinion of the Circuit Court of Appeals of the Sixth Circuit in Coca-Cola Company v. Gay Ola Company in 200 Fed. on page 723, contains a forcible comment on the state of facts here shown to exist:

> "It is first to be *be* observed that defendant is at the best on a narrow ground of legality. The name which it has adopted does not negative an intent to confuse. The product is identical, both in appearance and taste; and the form of script used in printing the "trademark" names is the same. Even if the use of each of these items of similarity was lawful, when accompanied by good faith and no intent to deceive, they put the product near that dividing line where good or [248] bad faith is the criterion, and their pres-

ence puts upon the user a burden of care to see that deception does not naturally result. Conversely, when we find, as a fact, from the other conduct of the defendant, that the underlying intent is to perpetrate a fraud upon the consumer, this intent must color the accompanying acts, and some which otherwise might be innocent become guilty. So here. The red color used by complainant on its barrels and kegs is not a color which it discovered, or to which it had any abstract monopoly; but this color has long been used by complainant in a way that was exclusive in this trade. No other manufacturer of analogous or competing drinks uses that color of package, and its adoption by defendant is one of the constituent parts of defendant's scheme of fraud. So, too, with defendant's failure to mark its packages with anything to indicate the place of manufacture. Ordinarily a man may mark his goods, or not, as he pleases; but when he has his marks and labels, which he uses on occasions, and can have no motive for sending out unmarked packages except to aid in a fraudulent substitution, the act, otherwise permissible, becomes forbidden."

The witness Wright of the Southern Koke Company justified the use of the name "Koke," for he says that the name "Koke" was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word "Dope" was adopted for the same purpose. I also find that the defendants' salesmen were in-

structed to sell and did sell both products as and for Coca-Cola. I find that both words are an abbreviation of the words "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola.

A decree is ordered for complainant. Counsel will prepare and tender a decree in accordance with this opinion.

Prescott, Arizona, July 6, 1916. **[249]**

[Endorsements]: In the District Court of the United States for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Arkansas, The Coke Company of Oklahoma, Defendants. In Equity (Phoenix). Opinion. Filed July 6, 1916. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. **[250]**

In the United States District Court for the District of Arizona.

March Term, A. D. 1916.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,

Defendants.

Decree.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED as follows:

(1) That the Court has jurisdiction of the subject matter and of the parties to the suit.

(2) That the word "Coca-Cola" is a valid trademark.

(3) That plaintiff is the owner of and alone entitled to use the trademark "Coca-Cola" and that its goods alone can lawfully be sold under that name.

(4) That the words "Koke" and "Dope" are each an abbreviation of the word "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product "Coca-Cola."

(5) That the defendant, The Koke Company of America, and its predecessor, J. C. Mayfield, did not adopt or make use of the name "Koke" until the year 1909, and that they had and have no right to its use. [251]

(6) That defendants and their predecessors have no interest in or claim to the trademark "Coca-Cola," the "Coca-Cola" business or formula, and the defendants and their predecessors' claim of interest in the "Coca-Cola" business, the trademark "Coca-Cola" and knowledge of the "Coca-Cola" formula are without foundation.

(7) That the words "Koke" and "Dope" were adopted and used by the defendants and their predecessors with the deliberate purpose of representing

their goods to be the product and manufacture of the Coca-Cola Company.

(8) That the defendants salesmen were instructed to sell and did sell defendants' product under the names "Koke" and "Dope" as and for "Coca-Cola."

(9) That the defendants and each of them, have infringed the plaintiff's trademark, and have been guilty of unfair competition with the plaintiff.

(10) That defendants, the Koke Company of America, the Southern Koke Company, Ltd., the Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, and each of them, their officers, servants, agents, employees, attorneys, licensees, transferees, and assigns, and each and all thereof, and all acting by or under their authority be, and they are each and all perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-Cola," or any like word, or the word "Koke," or any like word, or the word "Dope" or any like word; from [252] claiming or asserting any right in the name "Koke" or in the name "Dope," or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices used by the

defendants and referred to in the bill of complaint herein; from using in connection with the sale or shipment of any product, not the plaintiff's, barrels or receptacles, colored in imitation of the plaintiff's said barrels or receptacles; from stating or representing that the syrup made or sold by defendants, or any of them, is made from the same formula as Coca-Cola syrup or that defendants, or any of them, know or may rightfully use or employ the Coca-Cola formula; from coloring any product not the plaintiff's in imitation of or like the color of Coca-Cola without clearly indicating in connection with the sale thereof that the same is the product of the defendants and not of the plaintiff and further, from doing any act or thing, or using any name or names, devices, artifices, or contrivances, which may be calculated to represent that any product not of the plaintiff's production is the genuine Coca-Cola *Cola* of plaintiff, and that writs of perpetual injunction issue accordingly.

(11) That defendants and each of them be required to account to plaintiff for any and all profits derived [253] by them, or any or either of them, and to pay to the plaintiff such damages as it may have sustained by reason of the unlawful conduct of defendants and each of them, and that this cause be referred to a Master in Chancery of this Court, to take and state an accounting to the plaintiff for any and all such profits and any and all of said damages, with full power to subpoena and order the attendance of witnesses, the taking of depositions and the production of books, papers and documents pertinent

to the taking and stating of said account for profits and damages, and to report said account and statement of profits and damages aforesaid as by law provided.

(12) That defendants pay the costs of this suit to be taxed, and that upon taxation plaintiff have execution therefor.

WM. H. SAWTELLE,
Judge.

Dated September 16, 1916.

[Endorsements]: United States District Court for the District of Arizona. The Coca-Cola Company vs. The Koke Company of America et al. Decree. Filed Sept. 16th, 1916. Mose Drachman, Clerk. **[254]**

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF ARKANSAS, THE KOKE COMPANY OF OKLAHOMA,
Defendants.

Minute Entry Appearing Under Date of Saturday, September 16, 1916.

IT IS ORDERED by the Court that the injunction heretofore granted herein shall be suspended for

a period of thirty days from this date.

AND IT IS FURTHER ORDERED that, if during said period of thirty days an appeal shall have been taken to the United States Circuit Court of Appeals for the Ninth Circuit, said injunction shall be suspended during the pendency of said appeal but for no longer, conditioned upon the defendant filing a bond herein in the sum of $10,000 as required by Equity Rule 74, said bond to be filed within said thirty days. [255]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Monday, September 18, 1916.

IT IS ORDERED by the Court that the plaintiff herein be and it is hereby allowed an additional thirty days within which to file its memorandum of costs herein. [256]

In the United States District Court for the District of Arizona.

No. E–21 (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Tuesday, October 3, 1916.

IT IS ORDERED by the Court that this case be continued until the April, 1917, Term of this Court at Phoenix. **[257]**

In the United States District Court for the District of Arizona.

No. E–21 (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Wednesday, October 11, 1916.

Upon motion of counsel for the defendants herein, IT IS ORDERED that the former order of this Court fixing the amount of the supersedeas bond herein in the sum of $10,000, be, and the same is hereby vacated and set aside;

AND IT IS ORDERED that the same be fixed in the sum of $5,000, conditioned according to law. [258]

In the United States District Court for the District of Arizona.

No. E-21 (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Minute Entry Appearing Under Date of Saturday, October 14, 1916.

Upon motion of counsel for the plaintiff herein, IT IS ORDERED by the Court that said plaintiff be and it is hereby granted thirty days additional time within which to file its cost bill herein. [259]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY, a Corporation,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,

Defendants.

Petition for Appeal.

To the Honorable W. H. SAWTELLE, District Judge:

The above-named defendants feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 15th day of September, 1916, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and they pray their appeal be allowed, and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States District Court of Appeals for the Ninth Circuit under the rules of such court in such case made and provided, and your petitioners further pray that the proper order, relating to the proper security be required of them, be made.

RICHARD E. SLOAN,
A. B. LITTLETON,
Attorneys for Defendants.

Appeal allowed and the amount of the appeal bond as required by law is fixed at the sum of $1,000, said bond to be filed and allowed within ten days from the date hereof. It is further ordered that the injunction granted in the decree in the above [260] entitled cause be suspended pending the appeal in this case to the Circuit Court of Appeals upon the defendants giving a proper bond in the sum of $5,000 within ten days from the date hereof.

Dated October 16, 1916.

WM. H. SAWTELLE,
Judge.

Filed October 16, 1916. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [261]

In the United States District Court for the District of Arizona.

No. ——. IN EQUITY.

THE COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,
Defendants.

Assignment of Errors.

And now come The Koke Company of America, The Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas, Appellants, and make and file this their assignment of errors, upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the decree made and entered in said cause by this Honorable Court on the 16th day of September, 1916;

I.

The United States District Court for the District

of Arizona erred in failing to find, hold, adjudge and decree that plaintiff's product to which it has applied the name "Coca-Cola" is misbranded under and within the meaning of the first clause of that division of Section 8 of the Food and Drugs Act of June 30, 1906, which relates to the misbranding of food, because it was established by the greater weight of the evidence: (a) that said product [262] is a "food" within the meaning of said clause of said division of said Section of said Act; (b) that said product is introduced by plaintiff into the several states and is sold, shipped and delivered for shipment by plaintiff from the State of Georgia and from the various other states to various states other than those from which it is thus sold, shipped and delivered for shipment by it; (c) that said product is branded and labelled with the name "Coca-Cola"; (d) that said words "Coca-Cola" as thus employed are a representation of the presence in said food product of the substances coca and cola; (e) that there are substances known as coca and cola under their own distinctive names; (f) that plaintiff's said product contains no coca and no cola; (g) that it is not the substance or article, or a compound or a mixture of the substances or articles, which said name "Coca-Cola" imports and hence (h) that said product is (1) an imitation of the articles or substances coca and cola and (2) is offered for sale under the distinctive names of said articles.

II.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product

is misbranded under and within the meaning of the second clause of that division of Section 8 of said Food and Drugs Act which relates to the misbranding of food, because it was established by the greater weight of the evidence; (a) That plaintiff brands and labels the receptacles containing its said food product, so introduced, sold, shipped and delivered for shipment, by it, as aforesaid, with labels bearing thereupon said name "Coca-Cola" and a pictorial design or picture of coca leaves and cola nuts; (b) that said design or picture together with said name "Coca-cola" [263] are a representation that plaintiff's said food product contains coca and cola; and (c) are a representation that it is composed essentially of coca and cola, or of extracts derived therefrom containing the principal characteristic derivatives thereof; and (d) that plaintiff's said product in fact contains no coca and no cola; and (e) that it is not composed essentially of coca and cola, or of extracts derived therefrom containing the principal characteristic derivatives thereof; and hence (f) that plaintiff's said product is labelled and branded so as to deceive and mislead purchasers.

III.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is misbranded under and within the meaning of the fourth clause of that division of Section 8 of said Food and Drugs Act which relates to the misbranding of food, because it was established by the greater weight of the evidence; (a) That the packages containing plaintiff's said food product, so introduced,

sold, shipped and delivered for shipment, by plaintiff as aforesaid, and their labels, bear both a statement, and a design or device, regarding the ingredients or substances therein contained, to-wit, said words "Coca-Cola" and said pictorial design or picture of coca leaves and cola nuts, which said statement and which said design or device, are misleading, in that they lead to the belief; (b) that the substances or articles, coca and cola, are present in plaintiff's said product, when in fact they are not; (c) that plaintiff's said product is composed essentially of coca and cola, or of extracts derived therefrom containing the principal characteristic derivatives thereof, when in fact it is [264] not; (d) that said substances or articles coca and cola or extracts derived therefrom containing the principal characteristic derivatives thereof, are present in plaintiff's said product in substantial and appreciable quantities when in fact they are not; (e) that said substances or articles coca and cola, or said extracts so derived, as aforesaid, really and in fact perform important essential functions in plaintiff's said product, materially and substantially tend to characterize and distinguish it, and appreciably and materially contribute either to its color, appearance, taste, flavor, odor, aroma or stimulating qualities or materially and appreciably tend to produce or materially and appreciably contribute to the production of, the capacity or ability of said product to cause, or produce, its characteristic physiological effects upon thase who drink and consume it, when in fact they do not.

IV.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is misbranded under and within the meaning of the latter portion of the second clause of that division of Section 8 of said Food and Drugs Act which relates to the misbranding of food, because it was established by the greater weight of the evidence; (a) that plaintiff's said food product so introduced, sold, shipped and delivered for shipment, by plaintiff, as aforesaid, contains (1) cocaine, (2) alpha and beta eucaine, and (3) derivatives of said substances; and (b) fails to bear a statement on the labels attached thereto or to the receptacles containing it, of the quantity or proportion of such cocaine, or of such alpha and beta eucaine, or of any **[265]** of the derivatives of any of said substances contained therein.

V.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is adulterated under and within the meaning of the second clause of that division of Section 7 of said Food and Drugs Act which relates to the adulteration of food, because it was established by the greater weight of the evidence: (a) that plaintiff's said food product, so introduced, sold, shipped and delivered for shipment, by plaintiff, as aforesaid, contains, as an added ingredient, a large percentage of caffeine; (b) that said caffeine so contained in said product is not derived from coca leaves or cola nuts, but it is derived from tea leaves, coffee beans and other

sources; and (c) that said caffeine so derived has been substituted in plaintiff's said product, either wholly or in part (1) for cola and (2) for extracts derived from cola, or the cola nut, containing the principal characteristic derivatives thereof.

VI.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is adulterated under and within the meaning of the third clause of that division of Section 7 of said Food and Drugs Act which relates to the adulteration of *good*, because it was established by the greater weight of the evidence that the substantial and valuable constituents of (1) coca and cola and (2) extracts derived therefrom containing the principal characteristic derivatives thereof, have been wholly, or in part, abstracted from plaintiff's said product, so introduced, sold, shipped and [266] delivered for shipment, by plaintiff, as aforesaid.

VII.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is adulterated under and within the meaning of the fifth clause of that division of Section 7 of said Food and Drugs Act which relates to the adulteration of food because it was established by the greater weight of the evidence; that plaintiff's said product, so introduced, sold, shipped and delivered for shipment, by plaintiff, as aforesaid, contains, as an added ingredient a large percentage of caffeine which is a poisonous and deleterious substance and ingredient and which renders plaintiff's said product injurious to health.

VIII.

That said District Court erred in failing to find, hold, adjudge and decree that plaintiff misrepresents the nature, character, quality, contents and ingredients of its said product and deceives and defrauds the public with respect thereto, because it was established by the greater weight of the evidence:

1. (a) Plaintiff labels and brands its said product and the receptacles containing it with the name "Coca-Cola" and with a pictorial design or picture of coca leaves and cola nuts and (b) that said name "Coca-Cola" is a descriptive name and purports to describe essential ingredients of said product; (c) that said name "Coca-Cola" together with said pictorial design or picture induces the belief in the mind of the public and in the minds of purchasers (1) that plaintiff's said product is a beverage, the essential characteristic ingredients of which are coca and cola, or extracts derived therefrom [267] containing the principal characteristic derivatives thereof, when in fact it is not; (2) that said coca and cola, or said extracts so derived, are present in said product in substantial and appreciable quantities when in fact they are not; (3) that they perform essential functions therein and materially and appreciably tend to characterize and distinguish said product, when in fact they do not.

2. That plaintiff represents to the public, through its advertising and otherwise: (a) that its said product is composed essentially of coca and cola, or of extracts derived therefrom containing the principal characteristic derivatives thereof, when in fact is

not; (b) that the substances coca and cola, or said extracts so derived therefrom, are present in said product in substantial and appreciable quantities, when in fact they are not; (c) that said substances coca and cola, or said extracts so derived therefrom, perform important essential functions in said product, and materially and appreciably tend to characterize and distinguish it, when in fact they do not.

3. That plaintiff represents to the public, through its advertising and otherwise, that its said product is wholesome and healthful, that it is perfectly harmless and free from injurious tendencies, and that it is not injurious or deleterious to health, when, as a matter of fact, said product is not wholesome or healthful, but has injurious tendencies and is, in fact, injurious and deleterious to health.

4. That plaintiff represents to the public, through its advertising and otherwise, that its said product is pure, when in fact it is adulterated, as shown in assignments V, VI and VII, *supra,* and frequently contains impurities and other foreign substances such as insects, rodents [268] dust, grit, filthy decomposed and putrid animal and vegetable substances and other like impurities.

5. That plaintiff represents to the public, through its advertising and otherwise, that its said product does not contain cocaine, when in fact it does contain cocaine.

6. That plaintiff represents to the public, through its advertising and otherwise, and by the application of the name "Coca-Cola" to its product, that said product is identically the same product that plain-

tiff has always manufactured and sold under said name, and that it is identically the same product that Dr. Pemberton originally made and sold in Atlanta, Georgia, in 1886 and 1887, when in fact it is not, because essential constituent ingredients of the original product, as originally made by plaintiff, and as originally made by the said Dr. Pemberton, are not now present in plaintiff's said product, and plaintiff's said product contains essential constituent ingredients which said original product did not contain.

IX.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's business is unlawful, in that it is conducted in violation of sections 1, 2, 4 and 8 of the Act of December 17th, 1914, commonly known as the Harrison Anti-Narcotic Act, because it was established by the greater weight of the evidence:

1. That plaintiff's said product consists of, or contains, a compound, mixture, salt, derivative or preparation of coca leaves which have not been decocainized, which said compound, mixture, salt, derivative or preparation contains cocaine.

2. That plaintiff's business consists (a) in producing, manufacturing, compounding, mixing, dealing in, [269] selling, distributing and dispensing said product, (b) in having it in his possession and under its control, and (c) in sending, shipping, carrying and delivering same from the State of Georgia and from various other States, to persons in various States other than those from which it is thus sent,

shipped, carried and delivered by plaintiff, and to persons in the District of Columbia.

3. That plaintiff has never at any time (a) registered with the Collector of Internal Revenue of any District its name or style, place of business or the place or places where its said business is carried on, or (b) paid to such Collector of Internal Revenue the special tax of one dollar, as required and provided for by Section 1 of the Act of December 17th, 1914, commonly known as the Harrison Anti-Narcotic Act.

4. That plaintiff sells, ships, and distributes said product in commerce among the several States, and between the several States and the District of Columbia, and sells and dispenses it in such commerce to the public generally as a popular beverage, and to be used and consumed as such, and that such sales are not, and have never been, made in pursuance of any written order of the person to whom said article is, or has been, sold, as aforesaid, or any form issued in blank for that purpose by the Commissioner of Internal Revenue, as required by Section 2 of said Harrison Anti-Narcotic Act.

X.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's business is unlawful, in that it is conducted in violation of Section 3 of the Act of October the 15th, 1914, commonly known as **[270]** the Clayton Anti-Trust Act and consists in the open, flagrant and habitual violation thereof, because it was established by the greater weight of the evidence:

1. The plaintiff is engaged in commerce among

the several States within the meaning of Sub-section 2 of Section 1 of the Act of October 15th, 1914, commonly known as the Clayton Anti-Trust Act, and within the meaning of Section 3 of said Act.

2. That its business consists of making sales, and contracts for the sale, of its product in the course of such commerce for use, consumption and resale within the United States and the District of Columbia.

3. That said sales, and contracts for the sale, of its said product, in the course of such commerce, are constantly and habitually made upon the condition, agreement and understanding that the purchasers of said product will not use, or deal in, the goods, wares and merchandise of any of plaintiff's competitors, and that the making of such sales and of such contracts of sale, upon such condition, agreement and understanding, is the regular course of business by which plaintiff markets its said product.

4. That in the regular course of plaintiff's said business, plaintiff fixes the price of its said product, and discounts from, and rebates upon, such price, upon the condition, understanding and agreement that purchasers of its said product will not buy, use, handle, sell, or deal in, the goods, wares and merchandise of its competitors.

5. That the effect of such sales and contracts for such sales, and of such agreements, conditions and understandings, of the fixing of the price charged for its [271] said product, and of the discounts from, and rebates upon, such price upon the condition, agreement and understanding aforesaid, is to sub-

stantially lessen competition, and to tend to create a monopoly in the plaintiff of the cola beverage industry in trade and commerce among the several States and between the several States and the District of Columbia.

X.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff has openly, flagrantly and habitually, as a part of its regular course of business, violated Sections 1 and 2 of the Act of July 2, 1890 (26 Statutes at Large, 209), commonly known as the Sherman Anti-Trust Act, and that, therefore, its business is unlawful, because it was established by the greater weight of the evidence that, for the purpose of destroying defendants' business and the business of its numerous other competitors, and for the purpose of unlawfully monopolizing the trade in cola beverages in commerce among the several States, plaintiff has:

1. Combined and conspired and contracted and agreed with numerous soft drink dealers throughout the country to restrain the commerce in cola beverages by abstaining from buying, handling, using, selling or dealing in any product like the plaintiff's except that of plaintiff's manufacture.

2. Boycotted and blacklisted those dealing in defendants' product, and the products of plaintiff's other competitors, who have refused to combine and conspire, or to contract and agree with plaintiff as aforesaid, and plaintiff has refused and declined to sell them its product so long as they persisted in handling defendants' [272] products or any of

the said other competitive products.

3. Slandered and libelled those dealing in defendants' products, and in the products of plaintiff's other competitors, to their customers, and to the public generally in their respective communities, by uttering and publishing in writing of and concerning them, false and malicious statements and writings to the effect that said dealers are dishonest and engaged in deceiving and defrauding their customers, that defendants' product and said other competitive products which they handle and sell are dishonest and fraudulent products, made of cheap, inferior and harmful materials, and are poisonous and deleterious to health, that in handling said products said dealers are violating the law and infringing upon plaintiff's trade rights, thereby rendering themselves amenable to law and subjecting themselves to severe and costly penalties.

4. Slandered and libelled defendants and their business to their customers, present and prospective and to the public generally by uttering and publishing in writing of and concerning them false and malicious statements and writings similar to those set forth in paragraph 3, *supra*.

5. Maliciously threatened suits against, and prosecution of those dealing in defendants' product and in the products of plaintiff's other competitors, for alleged infringements of plaintiff's alleged trademark and for alleged unfair competition, because of the fact that they were handling and selling said competitive products; and otherwise intimidated, coerced and browbeaten them.

6. Brought numerous vexatious and frivolous suits against those dealing in defendants' product, and in the products of plaintiff's other competitors, not in good **[273]** faith, but simply and solely to harass and annoy the said dealers and make it unprofitable for them to continue to handle said competitive products.

7. Sent its agents and detectives to picket the stores and places of business of those dealing in defendants' product and in said other competitive products and to pry into their business secrets, and has sent its agents and detectives to defendants' place of business and to the places of business of its other competitors to acquire by fraud and stealth their lists of customers, business secrets, commercial plans, financial status and the volume of business done by them, in order to gain an unfair advantage over them and thus facilitate its efforts to hinder, restrain and destroy their business.

8. Sent its agents and detectives to spy upon railroad offices and freight depots and to trace shipments of goods from defendants' plant and from the plants of plaintiff's other competitors to their customers, and has sent its said agents and detectives out to shadow and follow defendants' salesmen and the salesmen of plaintiff's other competitors, and to endeavor, by means of threats, coercions, intimidations and otherwise, to procure the cancellation of orders for said competitive products secured by said salesmen, and by said means has procured the cancellation of many such orders, and has injured and almost destroyed defendants' business, and has thus

substantially restrained trade and commerce.

9. Carried on a general commercial campaign of terrorism and waged relentless trade war of "frightfulness" in order to exterminate competition and to acquire an unlawful monopoly. **[274]**

XII.

The said District Court erred in finding, holding, adjudging and decreeing that plaintiff's mark "Coca-Cola" is a valid trademark, that the plaintiff is the owner of and alone entitled to use said mark, and that its goods alone can lawfully be sold under that name, because:

1. Said mark is used by plaintiff in an unlawful business within the meaning of Section 21 of the Trademark Act of February 20, 1905, as amended: (a) in that it is used by plaintiff in interstate commerce upon an article of food which is misbranded, as set forth in assignments I, II, III, and IV, *supra;* (b) in that the use of said mark by plaintiff in interstate commerce as a trademark for, or as a brand upon, plaintiff's said product, constitutes a misbranding of the same, as set forth in said assignments I, II, III and IV, *supra;* (c) in that said mark is used by plaintiff in interstate commerce, upon an article of food which is adulterated, as set forth in assignment V, VI and VII, *supra;* (d) in that said mark is used by plaintiff in interstate commerce upon an article which contains cocaine, in violation of Sections 1, 2, 4 and 8 of the Harrison Anti-Narcotic Act, as set forth in assignment IX, *supra;* (e) in that said mark is used by plaintiff in its business, which is carried on in open, flagrant and habitual violation

of Section 3 of the Clayton Anti-Trust Act, as set forth in assignment X, *supra;* (f) in that said mark is used by plaintiff in its business, which is carried on by means of combinations and conspiracies and contracts and agreements in restraint of trade in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, as set forth in assignment XI, *supra;* (g) in that said mark is used by plaintiff in its business, **[275]** which consists in part of an attempt to monopolize the trade in cola beverages in commerce among the several States in violation of said Section 2 of said Sherman Anti-Trust Act, as set forth in said assignment XI, *supra.*

2. Said mark is used by plaintiff upon an article injurious in itself, as set forth in assignment VII, *supra.*

3. Said mark is used by plaintiff with the design to deceive the public in the purchase of its said product as set forth in assignments I, II, III, IV and VIII, *supra.*

4. It was established by the greater weight of the evidence that said mark "Coca-Cola" is a descriptive word and purports to describe plaintiff's said product and the nature, character, quality, contents or ingredients thereof, and that said mark was not in the actual and exclusive use of plaintiff, or of its predecessors in title, as a trademark for its said product, during the whole of the ten years next preceding the passage of the Trademark Act of February 20th, 1905.

5. It was established by the greater weight of the evidence that said mark "Coca-Cola" is a deceptive

mark, in that it falsely describes plaintiff's said product and the nature, character, quality, contents or ingredients thereof, as set forth in assignments I, II, III, IV and VIII, *supra.*

XIII.

The said District Court erred in finding, holding, adjudging and decreeing that this suit can be maintained to the extent that it seeks any relief under the provisions of the Trademark Act of February 20, 1905, as amended and to the extent that it seeks any relief predicated upon the theory that plaintiff's mark "Coca-Cola" is a valid trademark, because said mark is invalid **[276]** as a trademark for the reasons set forth in assignment XII, *supra*, and, not being a trademark, it cannot be infringed as such.

XIV.

That said District Court erred (1) in failing to dismiss plaintiff's bill to the extent that it seeks any relief under the provisions of the Trademark Act of February 20, 1905, as amended, and to the extent that it seeks any relief upon the theory that plaintiff's mark "Coca-Cola" is a valid trademark, because said mark is invalid as a trademark, and is used by plaintiff in an unlawful business, upon an article which is injurious in itself, with the design to deceive the public in the purchase of merchandise, as set forth in assignments I to XII, inclusive, *supra;* and (2) in failing to adjudge the costs of the cause, to that extent, against the plaintiff.

XV.

The said District Court erred in finding, holding, adjudging and decreeing that defendants' mark

"Koke" and defendants' mark "Dope" infringe plaintiff's mark "Coca-Cola" as a trademark:

1. Because under the pleadings in this case, as amended, there was no issue requiring or authorizing a determination of any such question.

2. Because plaintiff's said mark "Coca-Cola" is invalid as a trademark for the reason set forth in assignments I to XII, inclusive, *supra*, and cannot therefore be infringed as a trademark.

3. Because there was no evidence to sustain said finding.

4. Because said finding was against the greater weight of the evidence. **[277]**

5. Because it was established by the greater weight of the evidence that defendants' predecessors in title, exclusively owned and used the mark "Coca-Cola" and the business and goodwill connected therewith, and exclusively manufactured and sold "Coca-Cola" under said mark, prior to the time when plaintiff's predecessors in title first adopted and began to use said mark, and that defendants' predecessors in title, adopted and began to use the mark "Koke" as a trademark for their said product either prior to, or contemporaneously with the adoption and use of said mark "Coca-Cola" by plaintiff's predecessors, and that they and their successors have continuously so used the same ever since then down to the present time, so that even if the mark "Koke" should be thought to be an infringement of the mark "Coca-Cola," nevertheless at the time the alleged infringement began defendants' predecessors were guilty of nothing more heinous than infringing a

mark which they themselves had the right to use and which they had previously used, and, having had the right to use the mark "Coca-Cola," itself, they violated no rights of the plaintiff in using a mark which infringed the same.

XVI.

The said District Court erred in finding, holding, adjudging and decreeing that defendants' marks "Koke" and "Dope" are each an abbreviation of plaintiff's "Coca-Cola":

1. Because there was no evidence to sustain said finding.

2. Because said finding was against the greater weight of the evidence.

3. Because said finding is an absurdity. **[278]**

XVII.

The said District Court erred in perpetually enjoining and restraining the defendants and their officers, agents, servants, employees, attorneys, licensees, transferees and assignees, and all acting by or under their authority, from using or employing in connection with the manufacture, advertisement, offering for sale or sale of any product not being that of plaintiff's manufacture, the word "Coca-Cola" or any like word:

1. Because there was no allegation in the bill of complaint, as amended, that defendants had ever wrongfully or unfairly used or employed said word "Coca-Cola" or any like word, in connection with the manufacture, advertisement, offering for sale or sale of any product not being that of plaintiff's mnufacture; the word "Coca-Cola" or any like word.

1. Because there was no allegation in the bill of complaint, as amended, that defendants had ever wrongfully or unfairly used or employed said word "Coca-Cola," or any like word, in connection with the manufacture, advertisement, offering for sale or sale of any product not being that of plaintiff's manufacture.

2. Because there was no evidence to sustain the finding that defendants had ever wrongfully used or employed said words "Coca-Cola" in such connection.

3. Because said finding was against the greater weight of the evidence.

4. Because it was established by the greater weight of the evidence that said word "Coca-Cola" is not a valid trademark, as set forth in assignments I to XII, inclusive, *supra*, and that it is a descriptive word purporting to describe plaintiff's product and its nature, character, **[279]** quality, contents or ingredients, and hence that plaintiff is not entitled to its exclusive use, or to absolutely and unconditionally enjoin and restrain others from using it, regardless of whether it is used by them fairly and honestly, or otherwise.

5. Because said injunction is broader than the pleadings or the testimony warrant, in that it absolutely and unconditionally enjoins and restrains the defendants, their officers, agents and so forth, from using or employing said word "Coca-Cola" or any like word at all in any manner whatever for any purpose whatsoever, in connection with the manufacture, advertisement, offering for sale, or sale of

any product not being that of plaintiff's manufacture, without regard to the character or circumstances of such use and regardless of whether or not it is used rightfully, fairly and honestly, or otherwise—that is to say, it enjoins and restrains them, for instance, from stating that defendants' product is like or resembles "Coca-Cola" or is an imitation of "Coca-Cola." or is better than or superior to "Coca-Cola," or that it is manufactured under the direction of a man who was formerly in partnership with the person who invented "Coca-Cola" or is sold at wholesale at a less price than "Coca-Cola," etc. etc.

XVIII.

The said District Court erred, and was guilty of an abuse of discretion in passing the order entered on the 20th day of February, 1915, granting the plaintiff leave to amend its bill of complaint:

1. Because the amendment changed the cause of action from one for the infringement of a trademark to one for unfair competition, pure and simple, and was a radical [280] departure from the theory of the case as presented in the original bill of complaint and necessitated a different line of defense and required a new and extensive investigation into the facts, and the production of evidence different in character and volume from that called for under the issues raised by said original complaint.

2. Because no good and sufficient reason was shown for making said amendment at the time same was sought and allowed.

3. Because it worked a hardship and an injustice upon the defendants, for the reason that at the time

of said amendment plaintiff had taken all its testimony in chief, and the defendants had begun to take their testimony, and at the time of the taking of plaintiff's said testimony in chief the counsel for the defendants were unprepared to intelligently cross-examine the witnesses as to the facts relating to the new allegations made in and the new issues introduced by said amended complaint.

4. Because said amendment was allowed without requiring plaintiff to pay the costs of the cause up to that time, and without the imposition of any terms whatever. [281]

XIX.

The said District Court erred in finding, holding, adjudging and decreeing that defendants have no right to use either the word "Koke" or the word "Dope," and in perpetually enjoining and restraining them, and each of them, their officers, agents, and employees, etc., from using or employing in connection with the manufacture, advertisement, offer for sale or sale of any product not being that of plaintiff's manufacture, the word "Koke" or any like word, or the word "Dope" or any like word, and from claiming or asserting any right in said name "Koke" or said name "Dope";

1. Because it was established by the greater weight of the evidence that defendant's predecessors in title were the first to adopt and use the words "Koke" and "Dope" as trademarks for their said product, and that they and the defendants have continuously used the same ever since, and are, therefore, the owners of the same and entitled to their ex-

clusive use as trademarks for their said product.

2. Because it was established by the greater weight of the evidence that the defendant's predecessors in title enjoyed the actual and exclusive use of the said mark "Koke" as a trademark for their said product during the whole of the ten years next preceding the passage of the Trademark Act of February 20, 1905, and that, therefore, they are entitled to register said mark as a trademark under the terms of said Trademark Act; and hence that said mark is a valid trademark within the meaning of said Act, and its use by the defendants as such trademark is authorized by, and afforded protection under, said Act.

3. Because it was established by the greater weight of the evidence that the words "Koke" or "Coke" and "Dope," as used by the public and by purchasers in asking for the drinks to which they are applied by them, and as understood by dealers, dispensers and the public generally, are purely descriptive words having reference [282] solely to the nature, character, quality, contents or ingredients of such drinks, or to the popularly supposed physiological effect produced thereby, and having no reference whatever to origin, ownership, selection or manufacture, and are when so used in this sense, as distinguished from their use as a mark or brand upon goods, generic or *publici juris.*

4. Because it was established by the greater weight of the evidence, and formally admitted of record, that neither plaintiff nor any of its predecessors, has ever, at any time, used or employed, or authorized the use

or employment of, either of said words "Koke" or "Dope," in any manner, for any purpose, in connection with the manufacture, advertisement, offering for sale or sale of its said product, but that, on the other hand, plaintiff has openly, publicly, and notoriously, through its advertising and otherwise, repudiated said words on every hand.

5. Because it was established by the greater weight of the evidence that neither said word "Koke" nor said word "Dope" deceptively resembles any mark or brand used by plaintiff upon, or in association with, its said product.

6. Because it was established by the greater weight of the evidence and admitted, that plaintiff has never used or employed either of said words "Koke" or "Dope," or authorized their use or employment, in any manner for any purpose, in connection, or association with, the sale of its product, and that plaintiff does not claim, and has never claimed, any trademark rights therein, or any right to their exclusive use, and that plaintiff is not in fact entitled to their exclusive use.

7. Because, if plaintiff had ever in fact acquired any right to the exclusive use of either of said words, its action in openly, publicly, and notoriously repudiating them constitutes an abandonment therof, and a dedication to the public of any such rights [283] therein.

8. Because said injunction prohibits the sale of defendant's product when it is asked for by words aptly and appropriately descriptive thereof, and by the words most generally used to designate that char-

acter of commodity, and therefore, practically prohibits the sale of defendants product altogether, and gives plaintiff a practical monopoly of the entire class or type of drinks to which its drinks and defendants drinks belong.

9. Because said injunction is broader than is warranted by the pleadings or the evidence in that it absolutely enjoins and restrains defendants, their officers, agents, etc., from using or employing the word "Koke" or any like word, or the word "Dope" or any like word at all, in any manner, for any purpose whatever, in connection with the manufacture, advertisement, offering for sale or sale of any product not being that of plaintiff's manufacture, thus affording plaintiff all protection of a valid, technical trademark in words which plaintiff has never used or employed, which it has openly and publicly and notoriously repudiated on every hand and which are common generic terms, purely descriptive of the class or type of drinks to which they are applied, having no reference whatever to origin, ownership, selection or manufacture, and in which, therefore, plaintiff has no right to a monopoly, but which defendants and all the world may fairly and lawfully use without invading any rights of the plaintiff therein.

10. Because said injunction is broader than is warranted by the pleadings or the evidence in that it is not limited so as to merely enjoin any unfair use of the word "Koke" or any like word, or of the word "Dope" or any like word, or the use of them so as to convey any secondary meaning they may have ac-

quired, but absolutely enjoins any use of them at all, in connection with the manufacture, advertisement, offering for sale or sale of any product other than that of plaintiff's manufacture, in any manner, for any purpose whatever, [284] regardless of whether such use is fair or unfair or is confined to the primary descriptive meaning thereof or otherwise.

11. Because there was no evidence to sustain the finding that defendants have used said word "Koke" or said word "Dope" or any like word or words unfairly, the mere use of them by defendants and not any unfair use thereof, being all that was established.

12. Because it was established by the greater weight of the evidence that defendants have not used the said words or any like word or words unfairly, the mere use of them by the defendants, and not any unfair use thereof, being all that was established.

13. Because said injunction is broader than is warranted by the pleadings and the evidence in that it not only enjoins defendants, their officers, and agents, etc., from using the words "Koke" and "Dope" but also enjoins them from making any use whatever of any like word or words, and in as much as said words "Koke" and "Dope" are descriptive of the class or type of drinks to which they are applied, any other word or words that aptly described said class or type of drinks would necessarily have conveyed the same meaning, and, therefore, would be a like word or such like words, and hence said injunction enjoins said defendants from de-

scribing their product by any words whatever.

14. Because it was established by the greater weight of the evidence, and was not disputed, that plaintiff had silently acquiesced in the use of said words by defendants and their predecessors for many years and had never taken any steps whatever to assert any right, or claim or interest therein, and had never questioned the right to use said words in the manner in which defendants used them, or complained of such use as unfair, until the bill was filed in this case, and hence that plaintiff is estopped by its acquiescence and laches from now complaining of defendants' use of said words.

XX.

The said District Court erred in finding, holding, adjudging and decreeing that the words "Koke" and "Dope" are each used [285] by the public and by purchasers in designating plaintiff's product.

1. Because it was established by the greater weight of the evidence; (a) that said words "Koke" and "Dope" are each descriptive in character; (b) that their use by the public originated in the assumption or supposition that the drinks to which they were applied contained cocaine or some other potent drug of like character; (c) that said words were used by the public originally to describe or designate the nature, character, quality, contents or ingredients of the class of drinks to which they were applied, or the popularly supposed physiological effects produced thereby; and (d) that the use of said words by the public and by purchasers ever since then and down to the present time has continued and

spread upon said assumption or supposition, and said words have been used by the public and by purchasers ever since then down to the present time, and are now used by them, merely to describe or designate the nature, character, quality, contents or ingredients of the class of drinks to which they are applied or the popularly supposed physiological effect produced thereby.

2. Because it was established by the greater weight of the evidence that neither said word "Koke" nor said word "Dope" is now, or ever was, used by the public or by purchasers to designate plaintiff's product exclusively, or to indicate or designate plaintiff as the source or origin of the drinks to which they are and have been applied, but that said words are now, and have been for many years, used by the public and by purchasers to designate generically the class or type of drinks to which plaintiff's drink and defendant's drink and hundreds of other similar drinks of others belong.

XXI.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from interfering or threatening any prosecution, or interfering with the use of said names "Koke" and "Dope" as short names or nicknames of plaintiff's product: [286]

1. Because it was established by the greater weight of the evidence that said words "Koke" and "Dope" are not short names or nicknames for plaintiff's product exclusively, but are common generic descriptive terms used by the public and by pur-

chasers to designate a class merely and not origin.

2. Because it was established by the greater weight of the evidence that the action of the defendants in interfering with plaintiff's attempt to monopolize said names was taken in good faith and in the honest belief that said words, as used and employed by them, were valid trademarks and that the defendants were entitled to the exclusive use of same as their trademarks, and for the sole purpose of protecting what they honestly believed to be their rights and not to take any unfair advantage of the plaintiff or to unfairly compete with it.

3. Because it was established by the greater weight of the evidence that notwithstanding the fact that plaintiff has never used or employed said words "Koke" or "Dope" and that said words, as used and employed by the public in asking for soft drinks, are purely descriptive and therefore, *publici juris*, nevertheless plaintiff has threatened prosecutions and actually brought suits against defendants dealers and otherwise harassed, threatened, intimidated, coerced, bull-dozed and brow beaten them in an attempt to monopolize said words and to prevent their use by the defendants, and hence that plaintiff has come into Court with unclean hands and is itself guilty of vastly more pernicious unfair competition in this respect against defendants, than it even accuses defendants of.

XXII.

That the said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from using or employing, or authorizing

the use or employment of labels, designs or devices like those of the plaintiff or the labels or designs and devices used by the defendants and referred to in the bill of plaintiff in this cause: [287]

1. Because there was no evidence to sustain the finding the defendants have ever used any labels, designs or devices like those of the plaintiff, with the possible exception of a short time when two of the defendants adopted and used a label similar in shape and color to the label used by the plaintiff, the use of which label was voluntarily discontinued by said defendants many months before the filing of the bill in this cause.

2. Because it was established by the greater weight of the evidence that the labels, designs and devices used by the plaintiff are not peculiar to or distinctive of plaintiff's product, and do not serve to identify or distinguish it in the market, but are old in the art, common to the trade and in general use, except in so far as they bear thereon the words "Coca-Cola," and that the use of such labels, designs or devices by defendants, with the name "Coca-Cola" absent therefrom, could not amount to a misrepresentation as to the origin of their product or result in a deception of purchasers.

XXIII.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from using in connection with the sale or shipment of any product not the plaintiff's, in barrels or receptacles colored in imitation of plaintiff's barrels or receptacles:

1. Because it was established by the greater weight of the evidence that the color of defendants barrels is produced by a paint made from red clay, which is the cheapest and most serviceable paint on the market for the painting of barrels, and that said paint produces only one color, to wit, the color of the clay of which it is made, and hence that the use of said color does not rest along upon arbitrary selection, but results from considerations of economy, convenience and serviceability;

2. Because it was established by the greater weight of the evidence that the color of plaintiff's barrels is not now, or never was distinctive, and does not now or never did identify or distinguish [288] plaintiff's barrels in the market, but that said color for syrup barrels is now, and has been for many years, old in the art, common to the trade, and in general use by practically all the manufacturers and dealers in like products, and, indeed by the manufacturers of and dealers in all kinds of syrups, and that the use of barrels of such color could not possibly amount to a misrepresentation as to the origin of defendants' products, or result in a deception of purchasers.

3. Because it was established by the greater weight of the evidence that defendants and their predecessors used barrels of said same color prior to, and at the time, plaintiff's predecessors began to use barrels of said color, and have continuously done so ever since, in connection with the sale and shipment of products similar to the plaintiffs;

4. Because it was established by the greater

weight of the evidence that dealers could not possibly be deceived as to the origin of the product simply because of the color of the barrels in which it was shipped to them, and that the consumers do not see the barrels at the time of purchasing the product, and hence that the color of the barrels could not possibly cause them to be deceived as to the origin of the product.

5. Because it was established by the greater weight of the evidence that defendants, and their predecessors in title, have used barrels and receptacles of substantially the same color as plaintiff's said barrels, in connection with the sale and shipment of syrups similar to plaintiff's, for more than a quarter of a century, and that numerous other competitors of plaintiff have used barrels of the same color for many years with the knowledge and acquiescence of the plaintiff, and that, therefore, plaintiff is now estopped to complain of defendants' use of barrels of said color.

6. Because said injunction is broader than is warranted by the pleading and the proof in that it enjoins defendant from using not only barrels resembling plaintiff's in color, but also any receptacles of any kind resembling in color the corresponding receptacles of the plaintiff, without regard to whether or not the color of said receptacles is distinctive or is in general use, old in art and common to the trade. [289]

7. Because it was established by the greater weight of the evidence that the color of none of plaintiff's receptacles is distinctive, but that their colors

are all *of* old in the art, common to the trade, and in general use, so that the use of receptacles of such color by defendants could not possibly misrepresent the origin of their product or result in the deception of purchasers.

XXIV.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from stating or representing that they syrup made and sold by the defendants or any of them is made from the same formula as "Coca-Cola" syrup:

1. Because it was established by the greater weight of the evidence that defendants have not stated or represented that their syrup is made according to the same formula as plaintiff's syrup is now made.

2. Because it was established by the greater weight of the evidence that defendants' statements or representations to the effect that their syrup is made substantially according to the original "Coca-Cola" formula,—that is the formula by which Dr. Pemberton, the inventor of the drink, made it—were the truth.

XXV.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from stating or representing that they or any of them, know or may rightfully use the "Coca-Cola" formula:

1. Because it was established by the greater weight of the evidence that defendants' predecessor

in title, J. C. Mayfield, did know the "Coca-Cola" formula, because he purchased a part interest in it from the inventor of the drink, Dr. Pemberton, in 1888, and was taught how to make said product by the said Dr. Pemberton, and that he did in fact make and sell original, identical "Coca-Cola" syrup, and that he imparted his knowledge of said formula to the defendant, The Koke Company of America.

2. Because the defendants have the right under the law to use and employ the "Coca-Cola" formula.

3. Because it was established by the greater weight of the evidence [290] the defendants' predecessors in title, J. C. Mayfield, A. O. Murphy, E. H. Bloodworth and Dr. Pemberton, owned and conducted the coca-cola business, goodwill, and the formula, and that they and their successors have continuously ever since manufactured said product according to said formula.

4. Because it was established and admitted that plaintiff's formula is not patented, and it was established by the greater weight of the evidence that same is not a secret but that it is known and rightfully used by hundreds of plaintiff's competitors.

XXVI.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from coloring any product in imitation of or like the coloring of "Coca-Cola" without clearly indicating in connection with the sale thereof that the product is manufactured by the defendants and not by the plaintiff:

1. Because it was established by the greater

weight of the evidence that the color of plaintiff's product is not peculiar to or distinctive of plaintiff's said product, and does not serve to identify or distinguish it in the market, but that said color was before and at the time plaintiff adopted it, old in the are, common to the trade and universally used for coloring innumerable similar beverages and for coloring innumerable other varieties of soft drinks, and that hence the color of defendants' products could not possibly misrepresent its origin or result in the deception of purchasers.

2. Because it was established by the greater weight of the evidence that defendants' predecessors in title, manufactured and sold a beverage of precisely the same color as plaintiff's product, prior to the time when plaintiff's predecessors began to manufacture and sell plaintiff's product, and have continuously since then manufactured and sold said product and other similar products having identically the same color.

3. Because said injunction requires the defendants to extol plaintiff's goods in an attempt to sell their own. [291]

4. Because it was established by the greater weight of the evidence that plaintiff has silently acquiesced in the manufacture and sale of almost innumerable similar products having the same color as its product, for more than a quarter of a century, and in the manufacture and sale by the defendants of similar products, having the same color for more than a quarter of a century, and hence that plaintiff is now estopped and barred by its laches and acquiescence

from complaining of defendants' use of said color.

5. Because it was established by the greater weight of the evidence that plaintiff made no pretensions to the possession of any exclusive right to use said color, or of any right to enjoin others from giving to their products a color identical with, or like, the color of plaintiff's said product, until comparatively recently, and that the recent effort of plaintiff to monopolize said color is one of the steps in its scheme to monopolize the cola drink industry.

6. Because the color of defendants' product is not an arbitrary, fanciful feature of dress merely, but is in fact a fundamental, structural feature of the article, and a physical requirement thereof essential to commercial success.

XXVII.

The said District Court erred in perpetually enjoining and restraining the defendants from doing any act or thing, or using any names or nickames, devices, artifices or contrivances which may be calculated to represent that any product, not of the plaintiff's production, is the genuine Coca-Cola of the plaintiff.

1. Because it was shown by the greater weight of the evidence that defendants have not been guilty of any such conduct.

2. Because said injunction is too broad in that it is not specific, but is a general sweeping command to desist from any and all unfair competition without pointing out specifically what is prohibited.

XXVIII.

The said District Court erred in awarding plaintiff

a reference for damages and profits: [292]

1. Because there was no evidence to sustain the finding that plaintiff has suffered any actionable damage at the hands of the defendants.

2. Because plaintiff has silently and knowingly acquiesced in defendants' conduct for so long that it is now estopped and barred by its said acquiescence and laches from recovering damages or profits from the defendants.

3. Because this was a suit for unfair competition pure and simple and in such cases it is not proper to award profits.

XXIX.

The said District Court erred in finding, holding, adjudging and decreeing that the defendant, The Koke Company of America, and its predecessor, J. C. Mayfield, did not adopt or make use of the name "Koke" until the year 1909; because it was established by the greater weight of the evidence that the said J. C. Mayfield and associates, did adopt and first used said mark on or about the 14th day of April, 1888, and that they and their successors have continuously used the same ever since.

XXX.

The said District Court erred in finding, holding, adjudging and decreeing that defendants and their predecessors have no interest in or claim to the trademark "Coca-Cola," the Coca-Cola business or formula, and that the claim of the defendants, and their predecessors' claim, of interest in the Coca-Cola business, in the trademark Coca-Cola, and knowledge of the Coca-Cola formula are without foundation.

1. Because neither the defendants nor their predecessors have claimed any interest in the trademark "Coca-Cola" or the Coca-Cola business in recent years, their claim merely being that they formerly owned an interest therein, which is true.

2. Because it was established by the greater weight of the evidence that the defendants' predecessors' claim of interest in the Coca-Cola business, trademark and formula was well founded. [293]

XXXI.

The said District Court erred in finding, holding, adjudging and decreeing that the words "Koke" and "Dope" were adopted and used by the defendants and their predecessors with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company; because said finding was against the greater weight of the evidence.

XXXII.

The said District Court erred in finding, holding, adjudging and decreeing that the defendants' salesmen were instructed to sell and did sell defendants' product under the names "Koke" and "Dope" as and for Coca-Cola, because said finding was against the greater weight of the evidence.

XXXIII.

That said District Court erred in finding, holding, adjudging and decreeing generally that the defendants and each of them have infringed the plaintiff's trademark and have been guilty of unfair competition with the plaintiff; because said finding was against the greater weight of the evidence.

XXXIV.

The said District Court erred in failing to dismiss the plaintiff's bill and to adjudge all the costs of the cause against the plaintiff; because plaintiff has come into Court with unclean hands and has been guilty of such inequitable conduct on its part as deprives it of the right to the relief sought in its bill of complaint in this cause, as more specifically set forth in assignments I to XI inclusive, *supra.*

XXXV.

The said District Court erred in failing to find, hold, adjudge and decree that this suit was not brought in good faith to address any real or fancied grievance but that it was brought simply and solely in the attempt to acquire a monopoly by bankrupting the defendants with the enormous expense necessary to adequately defend themselves against this suit, and by defrauding the Court with perjured and corrupted testimony into rendering a decision and entering a decree which will operate [294] to give plaintiff a monopoly by establishing the precedent that no one but plaintiff may lawfully manufacture and sell the kind of drink that plaintiff makes and sells.

XXXVI.

The said District Court erred in rendering any judgment against the defendants, because of plaintiff's unclean hands and inequitable conduct as more specifically set forth in assignments I to XI inclusive, *supra.*

RICHARD E. SLOAN,
A. B. LITTLETON,
Attorneys for Defendants. [295]

[Endorsed]: In Equity No. ——. In the United States District Court for the District of Arizona. The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Assignment of Errors. Filed Oct. 16, 1916, at —— M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [296]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OR ARKANSAS,

Defendants.

Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, as principals, and the Southern Surety Company as surety, are held and firmly bound unto the Coca-Cola Company, a corporation, in the full and just sum of One Thousand

($1,000) Dollars to be paid to the said Coca-Cola Company, its heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals and dated this day of October, in the year of our Lord one thousand nine hundred and sixteen.

WHEREAS, lately at the March, 1915, term of the United States District Court for the District of Arizona, in a suit depending in said Court between The Coca-Cola Company [297] a corporation, plaintiff, and The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, defendants, a decree was rendered against the said defendants and the said defendants have obtained an allowance of appeal from the said decree of the said Court to reverse the said decree in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, shall prosecute their said appeal to effect and answer all costs if they fail to make good their said plea, then the above obliga-

tion to be void; else to remain in full force and virtue.

THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF OKLAHOMA,
and
THE KOKE COMPANY OF ARKANSAS,
By RICHARD E. SLOAN,
Attorney in Fact.
THE SOUTHERN SURETY COMPANY.
By V. C. COOK,
Attorney in Fact.

The foregoing bond is approved this 25 day of October, 1916.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In Equity No. E–21. In the United States District Court for the District of Arizona. The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Arkansas, Defendants. Appeal Bond. Filed Oct. 25, 1916 at —— M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy.

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,

Defendants.

Injunction Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, as principals, and The Southern Surety Company as surety, are held and firmly bound unto The Coca-Cola Company, a Corporation, in the full and just sum of five thousand dollars ($5,000), to be paid to the said Coca-Cola Company, its heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals and dated this —— day of October in the year of our Lord one thousand nine hundred sixteen.

Wherefore, lately at the March, 1915, term of the United States District Court for the District of Ari-

zona in a suit depending in said court between The Coca-Cola Company, a corporation, plaintiff, and The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, defendants, a decree was rendered against the said defendants, and the said defendants have obtained an allowance of appeal from the said [299] decree of the said court to reverse the said decree in the aforesaid suit and a citation directed to the said plaintiff citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit Court at the City of San Francisco thirty days from and after the date of said citation;

Whereas the above-entitled court by its order has suspended the injunction granted in said decree for the period of thirty days from its date and during the pendency of said appeal upon the defendants giving bond as required by Equity Rule 74, in the sum of five thousand dollars ($5,000);

Now, therefore, the condition of the above obligation is such that if the said The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas shall prosecute their said appeal to effect and answer all damages the said The Coca-Cola Company may suffer by reason of the suspension of said injunctive order during the pendency of said appeal, then the

said obligation to be void, else to remain in full force and virtue.

THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF OKLAHOMA,
THE KOKE COMPANY OF ARKANSAS,
By RICHARD E. SLOAN,
Attorney in Fact.

THE SOUTHERN SURETY COMPANY,
By V. C. COOK,
Attorney in Fact.

The foregoing bond is approved this 25th day of October, 1916.

WM. H. SAWTELLE,
Judge.

Filed October 25, 1916. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [300]

In the United States District Court for the District of Arizona.

E.-21 (PHX.).

THE COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,
Defendants.

Order Extending Time for Filing Transcript.

Good cause appearing therefor, it is hereby ordered that the time within which the defendants in the above-entitled cause are required to prepare and file with the Circuit Court of Appeals, a transcript on appeal be extended an additional sixty days from the 16th day of November, 1916.

WM. H. SAWTELLE,
Judge.

Original Copy mailed to Circuit Court of Appeals, Nov. 16, 1916.

R. E. L. WEBB,
Deputy Clerk. [301]

[Endorsements]: In the United States District Court for the District of Arizona. The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Order Extending Time for Filing Transcript. Filed Nov. 16, 1916. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [302]

In the District Court of the United States for the District of Arizona.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF ARKANSAS, THE KOKE COMPANY OF OKLAHOMA,

Appellants,

vs.

THE COCA-COLA COMPANY,

Appellee.

Order Extending Time to March 15, 1917, to File Transcript on Appeal.

Good cause appearing therefor, IT IS HEREBY ORDERED that the appellants have until the 15th day of March, 1917, within which to perfect its appeal and to file or cause to be filed the transcript on appeal in the Circuit Court of Appeals for the Ninth Circuit.

WM. H. SAWTELLE,

Judge of the District Court of the United States for the District of Arizona. **[303]**

[Endorsements]: In the District Court of the United States for the District of Arizona. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Arkansas, The Koke Company of Oklahoma, Appellants, vs. The Coca-Cola Company, Appellee. Order. Filed Jan. 8, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. **[304]**

In the District Court of the United States for the District of Arizona.

No. E–21. (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Order Extending Time to March 25, 1917, to File Transcript on Appeal.

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended for ten days from the date on which the order heretofore entered herein expires.

Dated at Prescott this 13th day of March, 1917.

WM. H. SAWTELLE,

Judge. **[305]**

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.–21 (Phx.) Order Extending Time for Filing Record on Appeal. The Coca-Cola Co., Ptf., vs. The Koke Company of America et al., Defts. Filed March 13, 1917. Mose Drachman, Clerk. **[306]**

In the District Court of the United States for the District of Arizona.

No. E.-21 (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

Order Extending Time to and Including April 10, 1917, to File Transcript on Appeal.

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended to and including the tenth day of April, 1917.

Dated at Phoenix this 24th day of March, 1917.

WM. H. SAWTELLE,

Judge. [307]

[Endorsements]: In the District Court of the United States for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. The Koke Company of America et al., Defendants. Order. Filed Mch. 24, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [308]

In the District Court of the United States for the District of Arizona.

No. E.–21 (PHOENIX).

THE COCA–COLA COMPANY, a Corporation,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

Order Extending Time to and Including April 15, 1917, to File Transcript on Appeal.

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended to and including April 15, 1917.

Dated at Phoenix, Ariz., this 2d day of April, 1917.

WM. H. SAWTELLE,
Judge of the District Court of the United States for the District of Arizona. **[309]**

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.–21 (Phoenix). The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America et al., Defendants. Order. Dated April 2, 1917. Filed April 2, 1917. Mose Drachman. **[310]**

In the District Court of the United States for the District of Arizona.

No. E.-21 (PHOENIX).

THE COCA-COLA COMPANY, a Corporation,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

Order Extending Time to and Including April 15, 1917, to File Transcript on Appeal.

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended to and including April 15, 1917.

Dated at Phoenix, Ariz., this 2d day of April, 1917.

WM. H. SAWTELLE,
Judge of the District Court of the United States for the District of Arizona. **[311]**

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.-21 (Phoenix). The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America et al., Defendants. Order. Dated April 2, 1917. Filed April 2, 1917. Mose Drachman. **[312]**

In the District Court of the United States, for the District of Arizona.

No. E.–21 (PHOENIX).

THE COCA-COLA COMPANY, a Corporation,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

Order Dated April 14, 1917, Extending Time Sixty Days to File Transcript on Appeal.

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended for sixty days from the date on which the order heretofore entered herein expires.

Dated at Phoenix, this 14th day of April, 1917.

WM. H. SAWTELLE,
Judge of the District Court of the United States for the District of Arizona. **[313]**

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.–21 (Phoenix). The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America et al., Defendants. Order. Dated April 14, 1917. Filed April 14th, 1917. Mose Drachman, Clerk. **[314]**

In the District Court of the United States, for the District of Arizona.

No. E.–21 (PHOENIX).

THE COCA-COLA COMPANY, a Corporation,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al,,
Defendants.

Order Dated April 14, 1917, Extending Time Sixty Days to File Transcript on Appeal.

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended for sixty days from the date on which the order heretofore entered herein expires.

Dated at Phoenix, this 14th day of April, 1917.

WM. H. SAWTELLE,
Judge of the District Court of the United States for the District of Arizona. **[315]**

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.–21 (Phoenix). The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America, et al., Defendants. Order. Dated April 14, 1917. Filed April 14th, 1917. Mose Drachman, Clerk. **[316]**

In the District Court of the United States, for the District of Arizona.

No. E.-21 (PHOENIX)—IN EQUITY.

THE COCA-COLA COMPANY,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF ARKANSAS, THE KOKE COMPANY OF OKLAHOMA.

Praecipe for Transcript of Record.

To the Clerk of the United States District Court for the District of Arizona:

Sir: You will please prepare a transcript of the record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the appeal to said court in said cause, and include in said transcript the following proceedings, pleadings, papers, records, files and exhibits, to wit:

The judgment-roll including original bill of complaint.

The motion to amend the bill of complaint.

The amendments thereto and the affidavits filed with respect thereto.

Transcript of minute entries.

Statement of the evidence.

Orders extending time for completing the record and filing transcript.

Petition on appeal and order granting supersedeas.

Assignment of errors.

Bond on appeal.

Supersedeas bond.

Citation on appeal. **[317]**

Praecipe for transcript.

Plaintiff's exhibits.

Defendants' Exhibit 1 to 279, inclusive, and from "A" to "F," and from rebuttal 1 to rebuttal 10–2, all inclusive.

And all other records, entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said appeal.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

RICHARD E. SLOAN,
A. B. LITTLETON,
Attorneys for Defendants.

[Endorsements]: In the District Court of the United States in and for the District of Arizona. The Coca-Cola Company vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Arkansas, The Koke Company of Oklahoma. No. E,–21 (Phoenix). In Equity. Praecipe for Transcript of Record. Richard E. Sloan, Augustine B. Littleton, of Counsel for Defendants. Service acknowledged this 27th day of March, 1917. J. E.

Morrison, Solicitor for Plaintiff. Filed March 27, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. **[318]**

Testimony in Chief of the Appellee, The Coca-Cola Company.

(The following depositions were taken in Atlanta, Georgia, July 27th to 31st, inclusive, 1914.)

Deposition of Samuel C. Dobbs, for Plaintiff.

SAMUEL C. DOBBS.

Direct Examination by Mr. HIRSCH.

I am forty-five years of age, reside in Atlanta, Georgia, and have resided there since 1886. In 1886 I was a druggist with Asa G. Candler & Company. I was in the laboratory, and traveling salesman, and in the shipping department. I do not know how long they were in business. I was with them from 1886 until they went out of business in 1892; then I went away for a short while on account of my health; and then took up work with the Coca-Cola Company. The Coca-Cola Company is a corporation, having been incorporated in February, 1892. Exhibit #1 is a certified copy of the charter of incorporation. While I was connected with the firm of Asa G. Candler & Company I knew Dr. Pemberton very well—I did not know him in the capacity of a business associate, but I knew him when I saw him, occasionally went to his place on Marietta Street, knew him when he came there to the place, sometimes waited on him.

(Deposition of Samuel C. Dobbs.)

The first "Coca-Cola" I ever saw, I think, was in the Spring of 1887. I was then in the shipping department of Asa G. Candler & Company, and we had an order to ship a gallon of "Coca-Cola," my recollection is, to Dr. Sellman at Douglasville—it is a little long to remember accurately, but I remember the package because it was the first I had ever seen. My recollection was that was in the Spring, along in May of 1887, because I know I was looking after the shipping at that time and it was brought in there to be shipped to some customer. It came from what was at that time 107 Marietta Street. I do not recollect that I went to 107 Marietta Street that day to get the order, I just remember the peculiar package because it was the first time I had ever seen it. In my visits to what was then 107 Marietta Street I saw Dr. Pemberton and Mr. F. M. Robinson and Charley Pemberton and a man named Walker. I do not know whether it was just at that time or not, you know, Mr. Hirsch, twenty-five years back it is difficult to determine **[319]** accurately just who you saw around the place. I remember the place well and remember several times seeing Charley Pemberton around there.

"Q. 19. What was the color of that drink you got in response to the order for 'Coca-Cola'?

"A. The same color it is now—brown, port wine color, more properly speaking a caramel color."

Around the Spring of 1887 I occasionally got an order for "Coca-Cola" and filled it. I think generally the order was turned over to us by Dr. Pember-

(Deposition of Samuel C. Dobbs.)

ton—that is a habit, you know, of manufacturers and wholesalers—and I also got some tickets, Charley Pemberton brought them in there; a ticket about the size of a small envelope, good for two glasses, and I drank it at the soda-fountain then run next door to us by a bakery. I do not know that I saw any advertising of "Coca-Cola" that year. In 1888 I saw quite a little bit of it. In 1889 there was more, and in 1890 there was still more because at that time it was being run from our drug-store. In 1891 there was quite a little bit more—quite a good deal in 1891. The conspicuous thing about that advertising from the period of 1887 up to 1891 was the peculiar script, the name "Coca-Cola."

Commencing in 1892 I traveled for the Coca-Cola Company, kept its books, and sometimes worked out in the factory—sort of "jack-of-all-trades" at that time, because there wasn't but three or four of us there.

The sales of "Coca-Cola" from 1886 to 1892 are as follows: In 1886, 25 gallons; in 1887, 1,049 gallons; in 1888, 1,933 gallons; in 1889, 2,171 gallons; in 1890, 8,885 gallons; in 1891, 19,831 gallons; since 1892 the records of the Coca-Cola Company have been made mostly under my own direction and often with my own hand, and are as follows: In 1892, 35,360 gallons; in 1893, 48,554 gallons; in 1894, 63,933 gallons; in 1895, 74,479 gallons; in 1896, 116,492 gallons; in 1897, 167,681 gallons; in 1898, 214,008 gallons; in 1899, 281,055 gallons; in 1900, 370,877 gallons; in 1901, 468,411 gallons; in 1902,

(Deposition of Samuel C. Dobbs.)
677,515 gallons; **[320]** in 1903, 881,423 gallons; in 1904, 1,133,787 gallons; in 1905, 1,548,888 gallons; in 1906, 2,107,661 gallons; in 1907, 2,558,782 gallons; in 1908, 2,877,732 gallons; in 1909, 3,486,526 gallons; in 1910, 4,190,149 gallons; in 1911, 4,815,677 gallons; in 1912, 5,504,956 gallons; and, in 1913, 6,767,822 gallons.

At present I am Vice-president of the Coca-Cola Company in charge of advertising and sales. The history of the advertising of "Coca-Cola" since 1892 is as follows: In 1892 the Coca-Cola Company spent for advertising $11,401.78; in 1893 we spent $12,395.-12; in 1894, $14,538.14; in 1895, $17,744.22; in 1896, $23,117.58; in 1897, $52,405.18; in 1898, $43,857.62; in 1899, $48,564.83; in 1900, $84,507.97; in 1901, $100,276.01; in 1902, $149,628.79; in 1903, $200,941,-40; in 1904, $280,985.12; in 1905, $356,552.07; in 1906, $486,553.47; in 1907, $550,775.12; in 1908, $624,077.-70; in 1909, $675,048.59; in 1910, $853,329.13; in 1911, $978,329.30; in 1912, $1,182,257.29; and, in 1913, $1,186,210.39.

In all that advertising I have mentioned the predominant feature has been the "Coca-Cola" trade-mark, appearing in red wherever we could. The name "Coca-Cola" was always the dominant central feature of the copy whether newspapers, magazines, bill-boards, posters or any other way, painted walls —in that peculiar script trade-mark. Ever since I have known "Coca-Cola" it has, when attached to the goods, or in advertising, been in the peculiar script to which I refer. The nature of this adver-

(Deposition of Samuel C. Dobbs.)

tising, starting back in 1892 on up to date, has been practically every legitimate form of advertising. Up to 1906 it was pre-eminently what is known as display advertising—that is, painted bulletins on boards, fences, painted walls, painted signs on windows over stores; also poster advertising, which is large lithograph posters pasted on boards, oil cloth signs of various dimensions, metal signs of various sizes and shapes. Last year the order for metal signs amounted to about four hundred tons of metal, and about 5,000,000 pieces, on every one of which appeared the words "Coca-Cola" in red—or red background—in the script form. Since 1904 we have been using to a very considerable extent magazines in **[321]** which it appears both in black and white and in colors. If in colors, the "Coca-Cola" script is always in red. The inside pages, we cannot generally get the colors; that is then printed in black and white. Since 1906 we have been using very largely newspaper advertising. Previous to that time we used it to some extent, but since 1906 we have been spending exceeding a quarter of a million dollars a year in newspapers. That generally appears in black and white, and always in the script, and, occasionally, we use back pages in colors, that is, red, black and white, particularly in the newspapers of large circulation like the Chicago "Tribune" and "Examiner"—papers of that type. This advertising has been going on all over the United States, in Cuba, Canada and in the Hawaiian Islands. Of course, newspapers, and magazines

(Deposition of Samuel C. Dobbs.)

particularly, circulate all over the world, we cannot control that circulation, but it has been concentrated to a very considerable extent in the United States and Canada. In regard to painting wall spaces in different cities, the rule we give out is this: We have our color combination, which is a red background—what is known amongst painters and paint manufacturers as "Coca-Cola red." We have established a peculiar color of red that a great many of the paint manufacturers make and brand as "Coca-Cola Red." These signs are painted with the red background and with white letters, in the "Coca-Cola script always, outlined with black with a green border. I do not know of a town in the United States hardly of 2,500 or over that has not got "Coca-Cola" signs in it. We have got now standing under contract exceeding five million square feet of walls. That does not have reference to iron signs—or tacking signs, we call them—and we have got about fifty thousand lineal feet—lineal feet means the length of the signs—of bulletin boards, in addition. We have had from five to eight crews of painters working during the past three or four years painting signs on windows, under windows, and what we call "privilege signs." We differentiate a "privilege sign" from a "contract sign." In the latter, we contract with certain paint concerns like the Thomas Cusak, of Chicago, R. C. Maxwell Company of Trenton, and many **[322]** other concerns of that sort, to paint for us certain states, with an allotment of so many square feet in a state or section,

(Deposition of Samuel C. Dobbs.)

for which we pay a specific price per square foot—that is what we know as "Contract work." This other work is small work where our crews, as here in Atlanta, go to a retail druggist or confectioner or soda-fountain man, who has a small space—it may be only one hundred square feet—but it is right in the heart of things—the contract painters cannot get that because the man won't let them have it—and for the privilege of painting our sign on that wall we paint for this dealer his name and business, and we are doing that all the time all over the United States. That runs into an enormous amount of footage, but we only keep a record of the signs. In addition to the name of the dealer there appears the regular script, "Coca-Cola," and, usually, "Delicious and Refreshing." We—that is, the Coca-Cola Company—have from ninety to one hundred men working constantly, and they call on the trade, and part of their duties is to decorate the fountains—put up signs, very frequently decorate a mirror with a permanent sign to stay there for several months—the purpose of each is to always get up the regulation "Coca-Cola" sign, with the script, invariably. I have before me here proofs of the 1914 newspaper and magazine copy. Exhibit #2 appears largely in the back pages of magazines where they can print it in colors. As you will notice, the word "Coca-Cola" appears there in large red letters—the "Coca-Cola" trademark. This has appeared in magazines with large circulation all over the country. Exhibit #3 is a piece of inside magazine copy—of black and

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white copy. This was designed largely for the women's publication of large circulation. This piece alone had a circulation this year of over a hundrde million copies. Exhibit #4, is similar in design, different in size, to fit what is known as the standard magazines, and also run as quarter pages in the larger publications. **[323]** In exhibit #5 you will notice the "Coca-Cola" trademark appears in red, which was used in the back pages, and second or third inside covers, of standard publications. Exhibit #6 is similar in design, and the name "Coca-Cola" appears in red. This was used on the back pages of such publications as "Colliers," "Leslies," etc. Exhibit #7 is similar in design, merely altered to meet the demand of different size media. Exhibit #8, magazine copy in colors, is a drawing by Hamilton King of New York for the early Spring campaign. This appeared in most of the leading publications of this country in May. Exhibit #9 and #10 followed the publication of Exhibit #8. The copy is in colors, the dominant note of red, used in back pages of various magazines published in the United States and Canada. This piece of copy had a circulation of more than a hundred million. Exhibit #11 represents to a very large extent the newspaper campaign for 1914, this copy appearing in newspapers in Canada, the United States and Cuba, representing an expenditure exceeding $300,000.00. In addition to this copy, submitted in Exhibit #11, was a number of back pages of newspapers in colors similar to the magazine exhibits. Exhibit #12 rep-

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resents copy for special publications, trade papers, magazines of small circulation and of irregular shape. Exhibit #13 represents copy gotten up especially for farm papers and religious papers. We have inserted this copy in most of the religious, and the best of all the farm, papers in this country, representing several million circulation in the suburban communities. Exhibit #14 represents what we call our "Four-Head-Cut-Out." That is used in window displays to fill in at the bottom, and 200,000 of these were used during the past twelve months. Exhibit #15 represents to a limited extent street car advertising. Since 1896 "Coca-Cola" advertising has appeared regularly in most of the street cars in the United States and Canada, as shown in these cards, always the script "Coca-Cola," and predominantly in red—either red background with the script white letters or the script in red letters. Exhibit #16 is a lithographed metal sign "Coca-Cola," script in [324] white letter outline, green border, red background. Of this sign, in various dimensions, running from 6 to 10 inches to 5 feet by 8 feet, we use annually exceeding five million pieces. Exhibit #17 is what is known as an "enamelled metal sign." These signs are permanent, being enamelled and impervious to the weather, only used in choice locations, and of these we use, in two sizes—12 inches by 36 inches and 18 inches by 45 inches—about 10,000 each annually. Some of these signs are now up and were placed by me personally in 1893. Exhibit #18 represents what we call a "festoon de-

sign." This is used in the decoration of soda-fountains, and of these, in various dimensions, we use 60,000 annually. Exhibit #19 is what we call a "Lithograph show card," lithographed in sixteen colors, framed, and is hung in confectionery stores, drug-stores of the better class, as a permanent decorative sign. Exhibit #20 represents special signs gotten out for the use of "Coca-Cola" bottlers, showing the regulation script "Coca-Cola," with a facsimile of "Coca-Cola" in bottles at each end 12 inches wide, 36 inches long, and of these we use 250,000 annually, tacking on stands and stores and fences. Exhibit #21 is what is known as a "cut-out' used for window display and store display, mounted on heavy cardboard, and of these, in various designs, the Coca-Cola Company uses annually about 50,000. Exhibit #22 is known as the "Seashore Cut-Out" and it's uses are similar to those described for Exhibit #21, and of these the Coca-Cola Company used in 1914, 35,000. Exhibit #23 is a "four-head-festoon design" used for decorating soda-fountains, and, occasionally, in window displays. Of these the Coca-Cola Company used, in 1913, 60,000. Exhibit #24 is a lithographed metal imperial display sign. This is a permanent sign displayed in drug-stores, confectionery stores, and dealers in "Coca-Cola." 10,000 were used in 1914. Exhibit #25, similar to Exhibit #24, but smaller in design, is used in small stores and stands, containing reproduction of bottles. 20,000 were used previous to 1914. Exhibit #26 is a metal sign used for tacking

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under windows and over gratings. Of these we use 50,000 annually. Exhibit #27 is a "fibre" **[325]** sign, used very largely in temporary stands and for tacking on walls, fences, etc., and of these we have used exceeding 200,000. Exhibit #28 is an exhibit of three trays. Of these we use two million annually for the purpose of serving "Coca-Cola" at soda-fountains throughout the United States, and Canada. The "Coca-Cola" trademark appears in red, in the usual script design, in all of these. We have been using these trays in various designs since 1896. Exhibit #29 represents a window trim showing interior of a store, customers entering and being served; at the top of the window appears the usual trademark script in red, 42 inches long and 18 inches high. Exhibit #30 is a window trim of different design used for similar purposes as described in exhibit #29. Of these we use 50,000 a year. Exhibit #31, five-head window display showing in poster effect five girls' heads, facsimile of "Coca-Cola" glass, showing script trademark. These the Coca-Cola Company uses in quantities of 200,000 to 250,000 a year for making window displays and mirror decorations on soda-fountains. These we send in large quantities to the trade on request and they make their own displays. Exhibit #32 is a Japanese fan for general distribution, of which we have been distributing a million annually since 1906. Exhibits #33 and #34 are Christmas decorations representing typical Christmas wreaths and bells. We distribute annually 50,000 of these just

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previous to the Christmas Holidays for fountain decorations. Exhibit #35 is the "Coca-Cola" song, about 50,000 copies of which have been distributed. Exhibit #36 is a transparent transfer sign for pasting on windows as illuminated display at night. Exhibit #37 is a folder, typical of a number the Coca-Cola Company mails out periodically to the trade. Exhibit #38 is of different design, but for similar purpose as exhibit #37. Exhibit #39 is a 1914 calendar. A million of these was distributed by the "Coca-Cola" Company through its representatives and by mail in 1914. We have been getting out a calendar annually for the past fifteen years. Exhibit #40 is a copy of the Coca-Cola Company's 1911 calendar. **[326]** Of these a half million were used. Exhibit #41 is a thermometer. Of these we distribute in various sizes 40,000 to 50,000 annually. Exhibit #42 is a match book given to cigar stores having soda-fountains, and drug-stores having cigar counters and soda-fountains, for free distribution to the trade, ten million annually being distributed. Exhibit #43 is a paper doily used for free distribution to customers serving drinks on the outside and lunch stands, approximately fifty million being distributed annually. Exhibit #44 is a celluloid fountain design used for display on soda-fountains. Exhibit #45 is a 24 sheet poster used for posting on billboards, showing trademarks ten feet by twenty feet. Advertising of this nature is used in various sizes from forty-two inches up to this size. Exhibit #46 is a poster design placed in the middle of

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windows in connection with the window displays, and often used in the floor decoration displays. Exhibit #47 is an oil cloth sign used for tacking over store fronts, sides of walls and on refreshment stands generally. Exhibit #48 is a large calendar used for business houses and railroad offices. 10,000 of these are distributed annually. Exhibit #49, pencils used for gratuitous distribution to consumers, annual distribution one thousand gross. Exhibit #50 is a sample of what the Coca-Cola Company use as a trade proposition, mailing to the dispenser monthly. Exhibit #51 is a transparent sign used for posting on transoms and windows in localities where painters are unable to get. Exhibit #52 is another fountain sign used for display. This is an old design. We have used nothing like it since 1896. It would be impossible to say just when this was used—some time between 1892 and 1896. Exhibit #53 is a blotter for distribution to the consumers in office buildings, hotels, etc., annual distribution about twenty million. Exhibit #54 is a frame metal sign two feet wide and five feet long showing reproduction or facsimile, of the various wall and bulletin signs. These are used where the painters are unable to paint a wall, or the tenant or owner will not permit the wall to be painted, but will permit a sign to be tacked on for display, and of these 10,000 annually are distributed. Exhibit #55 is an oil cloth sign distributed to **[327]** bottle customers. Exhibit #56 is a transparent globe, mosaic art-glass work, placed in fountains of the higher class. Of

(Deposition of Samuel C. Dobbs.)

these the Coca-Cola Company has distributed more than five thousand in the past three years.

"Exhibit #57 is an art-glass sign similar to the transparent globe. Exhibit #58 is a baseball score card used in ball parks for free distribution through the concessionaire. Of these twenty-five million have been distributed. We have got only a limited amount of stuff here because we use it up and it is gone. Most of these here are of right recent date. Advertising of similar kind and character has been used by the Coca-Cola Company from 1892 up to date, differing in amount according to the amounts I have stipulated as having been spent for advertising—all right along the same line showing predominantly the color of red, and the trademark script, "Coca-Cola."

The business of the Coca-Cola Company consists of the manufacture and sale of a beverage known as "Coca-Cola," which it has been manufacturing and selling since its organization in 1892. Immediately preceding the Coca-Cola Company said beverage was manufactured by Walker-Candler & Company—Asa G. Candler, proprietor; and immediately preceding Asa G. Candler, proprietor, by Walker-Candler & Company; and previous to that, by Vanable, Lowndes & Company, I believe, or Vanable and Lowndes—it was George Lowndes and Willis Vanable, and, I believe, Mr. Walker. The Pemberton Chemical Company, is my recollection, preceded them. That product has always been sold under the name "Coca-Cola." In my experience, and in my travels I have never known of any other product

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known under the name "Coca-Cola."

Why, yes, I guess you could say I am familiar with the manufacture of "Coca-Cola"—I see it done, but I am not engaged in the manufacture. The color of Coca-Cola is a caramel color—or about the color of port wine, the nearest description—and it has been that color ever since I have known it. That color is produced by the addition of burnt sugar, which is used for coloring and for no other purpose whatever.

The syrup manufactured by the Coca-Cola Company is shipped in barrels, kegs and jugs, colored red, and said company has been doing [328] so ever since it started manufacturing it—identically the color they are now using. In the early days we bought red paint from here and there, and sometimes there was a slight variation in the color of red, and quite a number of years ago—something like ten or twelve years ago, I cannot determine definitely—we arranged with Samuel H. French & Company, of Philadelphia, to make for us—for the Coca-Cola Company and their various branches—this particular red which they know as "Coca-Cola red" and ship to us as such. Every barrel or keg we have gotten out is painted that color of red.

"Coca-Cola" is dispensed at soda-fountains in the proportion of one ounce of syrup to six ounces of carbonated water. It is generally kept in a jar inside of the soda-fountain, sometimes in a dispensing bottle on a counter, and in some instances in a special container. The Coca-Cola Company furnishes dispen-

(Deposition of Samuel C. Dobbs.)

sing bottles, a sample of one of which is shown by Exhibit #59.

I was sales manager for the Coca-Cola Company in 1904. From 1892 to 1896 I was traveling salesman for the company most of the time. From 1896 to 1904 I was in the office most of the time. Later, as sales manager, I travelled all over the United States every year—I covered the country every year as sales manager for the company. I frequent soda-fountains and call for "Coca-Cola."

"86. From its appearance alone, Mr. Dobbs, how do you identify 'Coca-Cola'?

"A. By its color.

"Q. 87. If you were to see a whole lot of barrels in front of a soda stand painted red, what would be your conclusion from those barrels?

"A. That they were 'Coca-Cola' barrels."

In frequenting soda-fountains, the principal drink I hear called for is "Coca-Cola"—that's the one big thing that's called for; but I hear other names used, as nicknames for Coca-Cola, particularly here in the South, young men go in and call for a "dope" or a "koke."

(Objected to by defendants because irrelevant and not warranted by the pleadings. Objection overruled. Exception.) **[329]**

My recollection is that it has been some ten or twelve years that I have heard these names used. The first time I heard it was here in 1901. The "Coca-Cola" was getting up quite a little sale at that time and a Dr. Scott, an old gentleman with nothing much

(Deposition of Samuel C. Dobbs.)

to do, noticed the demand for "Coca-Cola" at Venable's soda-fountain, and, from the fact that it had extract of coca leaves in it, apparently came to the conclusion that it had cocaine in it, and he wrote a card to the "Constitution" condemning its use and made the statement that it had cocaine in it, and from that arose, we assume, to the best of our knowledge, they got to calling it, as a joke, "Koke." Well, that was the first starting of it—I have even heard a boy going to a soda-fountain say, "Give me a shot in the arm" and I corrected the boy—over on Alabama and Broad Street, he called for a "shot in the arm" and the man served him "Coca-Cola." From my experience traveling around and hearing the use of the word "koke" and "dope," those words are, in my opinion, a nickname for "Coca-Cola" and exclusively refer to "Coca-Cola" invariably.

(Objected to by defendants because irrelevant and not warranted by the pleadings. Objection overruled. Exception.)

Exhibit #60 consists of several letters of endorsements and recommendations that came to Mr. Candler in the early years of the history of "Coca-Cola." I know of these people, some are addressed to Mr. A. G. Candler—some are addressed to the Coca-Cola Company. They are genuine letters and came to us—to him and to the Coca-Cola Company, in the due course of business and while I was connected with the business. I recognize the signatures of nearly every one of these and knew the individuals.

(Objection by defendants to the introduction of

(Deposition of Samuel C. Dobbs.)

Exhibit #60 and the testimony with respect thereto, because said documents filed as said Exhibit are unsworn, hearsay statements and are immaterial and irrelevant. Objection overruled. Exception.)

Exhibits #61 and #62 are labels used on "Coca-Cola" bottles. This particular form has been in use since 1907. **[330]** Previous to that time we used a label similar in shape but red in color. Exhibit #63 is a certification of the registration of trademark "Coca-Cola" January 31, 1893. Exhibit #64 shows the registration of the trademark October 31, 1905.

(Objection by defendants to the introduction of Exhibit #63 because not warranted by the pleadings. Overruled. Exception.)

"Coca-Cola" syrup is shipped to the bottling plants, which are about 600, scattered all over the United States, in barrels, and the bottling plants then bottle the syrup in these bottles—regulation "Coca-Cola" bottles—in the proportion of one ounce of "Coca-Cola" syrup to six ounces of carbonated water. This is done either by foot-power machines or automatic machines, under the authority and supervision of the Coca-Cola Company. We supply these bottlers with labels to put on the bottles. These bottles that are gotten up for the bottling of "Coca-Cola" are generally uniform. There is a "Coca-Cola" bottle—known as the "Coca-Cola" bottle, and published in the catalogue as "Coca-Cola's." These bottles are sold in almost every city in the United States, in Havana, Cuba, in Santiago, Cuba, and in twenty-five or more cities in Canada,

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and it is bottled to some extent in foreign countries—proportionately, not to any large extent.

(Plaintiff here offered and tendered in evidence Exhibits Nos. 1 to 64, inclusive.)

It is agreed between counsel for plaintiff and defendants that the exhibits need not be attached to the depositions, but that same be identified by the commisioner and retained in the custody of counsel for the party tendering same, and that same be produced on the trial of these causes.)

Cross-examination by Mr. LITTLETON.

The "Coca-Cola" bottle is uniform in size and shape, but not always in color.

"XQ. Is it not a fact that 'Coca-Cola' is bottled under authority of the Coca-Cola Company in white bottles, amber bottles, dark-brown bottles, flint bottles and green-colored bottles? [331]

"A. Well, there is very little difference between what is termed by the trade as flint, green or white. to the average consumer they are all alike. Some of the bottling plants are using the amber bottles, but the proportion of them is comparatively small, and it is a thing we have objected to and are rapidly getting cleared out, but the dominant portion of 'Coca-Cola' is bottled in the regulation 'Coca-Cola' bottles."

The regulation "Coca-Cola" bottle consists of a seven and a quarter ounce bottle, usually in a green—that is, a very light green, not a dark olive green, but a clear bottle with rather a distinctive shoulder shape. I have seen "Coca-Cola" bottled in eight-

ounce bottles, and in seven-ounce bottles, but I do not think I ever saw any in a six-ounce bottle. When it originally started the bottles held about eight ounces, but they have been gradually eliminated—we have been gradually eliminating that, we had lots to learn when we started the bottling business. For the past several years, the "Coca-Cola" bottles have all been tending towards one particular shape. Oh, there have been differences in shape in the past, yes, and it is sold now in bottles of different shapes to a very limited extent. Now and then a bottling plant will get some bottles—run short and get some bottles of different shape—but it is a very small part of the bottling business. I have been in most of the bottling plants all over the United States within the past eighteen months.

It was not in 1911, I think it was later—I do not recollect now—but there was a meeting of the "Coca-Cola" bottlers held here in Atlanta to adopt a uniform bottle. Just exactly what year the meeting was held I do not know, because that is a problem the bottlers have to contend with and more particularly dealing with the legal department than with me. The reason we wanted a uniform bottle was to protect ourselves against infringements. There would not have been any necessity to adopt a uniform bottle if they had all been uniform before that. **[332]** I have seen "Coca-Cola" put up at soda-fountains in dispensing bottles of a design and shape different from Exhibit #60. Sometimes soda-fountain men themselves buy an ornate bottle, and "Coca-

(Deposition of Samuel C. Dobbs.)

Cola" is exhibited to the public in those different shaped bottles occasionally, though very rarely—in fact, ninety per cent of the "Coca-Cola" that is dispensed is dispensed right from the jars. But in places where these dispensing bottles are used they are exhibited to the public—they are where the public can see them—but there is very few of them, because a man that gets this dispensing bottle keeps it, it don't cost him anything, as a rule. I have seen "Coca-Cola" dispensed out of a quart whiskey bottle. I know a dispenser in Richmond that keeps "Coca-Cola" in quart whiskey bottles and packed in ice. I have seen dispensing bottles with the words "Coca-Cola" on there, sometimes in black, sometimes in red, sometimes in block letters, sometimes with a sort of old English. I have seen probably a dozen in all my experience—very seldom.

I am not a chemist. The question as to why they use caramel in "Coca-Cola" is not a question of chemistry, it is a question of business practice. I know that they do not put the caramel in there for any other purpose than just to color the drink, because the Coca-Cola Company has been making it and I know that caramel has no effect upon the taste. We have experimented by making it without the caramel, too. It has been done here in our laboratory in my presence and under my observation. No, I did not say caramel has no taste at all; I say that caramel, in "Coca-Cola," has no effect upon the taste. Caramel in its concentrated form has a rather bitterish acrid taste.

(Deposition of Samuel C. Dobbs.)

I do not recollect ever having seen a piece of advertising consisting of a blue back-ground display poster with "Coca-Cola" printed on there in white letters and the rest of the legend in bright yellow letters. I certainly never bought anything of that kind for the Coca-Cola Company. I know the type of advertising that is used in the different localities, and if we have got some five hundred display advertisements of that sort in Chattanooga, Tennessee, I never bought it. **[333]** Yes, I do recollect that now. That was a poster, I think, probably gotten out by Mr. Rainwater for the bottlers, but it has the "Coca-Cola" trademark in the regular script. We sometimes occasionally get away—have in the past—less now than ever before—from it always appearing in red. In fact some years ago I concluded that red was such a dominent color that possibly it would be more attractive to have another color, but it did not amount to anything because I soon found my mistake and I came back to the combination of colors; but still, sometimes in getting out a poster the color combination is not such as that we can use that dominent red, but we always use the trademark "Coca-Cola" in the script. We sometimes advertise it in street-cars in white letters on green back ground, and sometimes in dark red letters, but always in the "Coca-Cola" script. The dominant color is red, seventy or eighty per cent of it. We have a calendar coming out for 1915 that we cannot use the red in except in the dress of the girl, but the rest is the "Coca-Cola" design.

(Deposition of Samuel C. Dobbs.)

I was with Candler & Company in 1887. At that time said company were jobbers of "Coca-Cola." We bought it from the Pemberton Chemical Company. I do not know whether or not at that time the Pemberton Chemical Company was a corporation, but they were doing business as the Pemberton Chemical Company. I could not tell you definitely whether they were doing business that way up until Mr. Candler bought, but I think that they were—no, not until he bought, because there passed an interim in there that Walker, Vanable and Lowndes had "Coca-Cola." I was in Atlanta all the time during 1887 and 1888. Quite frequently I went down to the place on Marietta Street where "Coca-Cola" was manufactured to get something. The business house there was an old residence, a sort of old rookery, where people rented rooms and things of that kind, and this manufacturing place was in a back room towards Walton Street. They had their office and storage and things—bottles and things—in a room fronting on Marietta Street. My recollection is the number of the house was 107. The building is down there yet, **[334]** although the number has been changed since—an old red brick building. The equipment and machinery which Dr. Pemberton had for making this stuff consisted of a copper kettle which held forty gallons and which was afterwards turned over to Mr. Asa G. Candler, and a wooden paddle. I did not know Mr. Pemberton very well in 1887 because I was just a mere boy and Doc Pemberton was on old man. I would not natu-

(Deposition of Samuel C. Dobbs.)
rally be much associated with him. All I knew about his business at that time was that I would have to go down there to get a gallon of "Coca-Cola." I was largely sent as an errand boy by Mr. Candler. I was eighteen years old at that time—just a green country boy.

Dr. Pemberton started "Pemberton's French Wine Coca" a long time before "Coca-Cola." A. G. Candler used to buy that in large quantities. That was put up in a bottle—what we call "sixes"—six to a gallon. I do not remember when the trade on that payed out. My recollection is that along in 1887 there was very little, if any, demand for it. We had some in stock, but I do not know whether there was any demand for it or not, but he manufactured it previous to 1886–1887—"Pemberton's French Wine Coca." Candler & Company bought a great deal of it and sold it, but it was not dispensed, it was sold in these bottles as a medicine. Dr. Pemberton made some other preparations, too. I remember the kind of labels Dr. Pemberton used on that "French Wine of Coca." About the only thing I remember that it said on there—I would recognize it if I was to see it now—was "Dr. Pemberton's French Wine of Coca." It was some kind of nerve tonic. I do not remember whether he stated on there whether it was made from some kind of extract of coca leaves and kola nuts, that was too far back. Among other coca wines or kola cordial that were made at that time by various parties was "Vin-Mariani" and "Kolafra." "Mariani" was

(Deposition of Samuel C. Dobbs.)

made up East somewhere. [335] "Vin-Kolafra" was made by Johnson & Johnson. There was "Vin-Mariani"—oh, three or four of those preparations that I do not recall right now, all put up in bottles. I presume they were made out of coca. They carried that inference by the name on them. Along about that time, or just previous thereto, there was quite a little business on that class of product, they had a sort of run on it along in those years. My recollection is that Dr. Pemberton and associates in 1887 also made a "Globe Flower Cough Syrup" and "Indian Queen Hair Dye," something of that sort, I just had a recollection—that only way that I recall it with any kind of definiteness is that somewhere in that period around 1888 or 1889 they, I think, went out of business, either Pemberton Chemical Company or Medicine Company—one was succeeded by the other—and a lot of that stuff was sent up to Asa G. Candler's warehouse on Peachtree Street for storage—"Globe Flower Cough Syrup" and "Indian Queen Hair Dye" and "Stillinga," I recollect having put a lot of the stuff away.

This testimony I have given about transfers from Pemberton, Lowndes and Venable, etc., is not just hearsay; I was with Mr. Candler and knew of the occurrence at the time. I was there when one instrument was signed. Woolfolk Walker was in the office and George Lowndes. I do not recollect definitely whether that was the transfer from Walker and Lowndes to A. G. Candler. I know I was in the office a good deal of the time and knew of the trans-

actions going on—knew it as it happened. And then I made a little trip, when Walker, Candler & Company owned "Coca-Cola" down the Georgia railroad for them, and Mr. Walker also traveled out through Alabama. I knew Mr. Walker quite well, and they had an old-fashioned Mathews bottling apparatus in a shed where this 107 Marietta Street is, and some of the goods were sold in bottles then—put up in an old Hutchinson stoppered bottle—I I know I sold some down at Lithonia. When I say "goods," I mean by that "Coca-Cola." **[336]**

I am an officer and stockholder in the Coca-Cola Company. I do not own a great deal of the stock but I own enough to keep the wolf from the door, which I bought and paid for.

Redirect Examination by Mr. ROGERS.

My recollection is that this "Vin-Mariani" I have reference to was a dollar preparation. It was not a beverage, but a medicine—a nerve tonic it was advertised. The same applies to "Vina-Kolafra." "French Wine Coca" was also sold as a tonic and medicine at a dollar a bottle, I think it was, not as a beverage at the soda-fountain. The copper kettle, which I mentioned a while ago as having been delivered to Asa G. Candler, came from 107 Marietta Street and is the one I referred to as having been used by Dr. Pemberton—it is the one that was in use down there when I first began going down there.

Recross-examination by Mr. LITTLETON.

My recollection is that I was one of the draymen that brought it up—that is as near as I can recollect

(Deposition of Samuel C. Dobbs.)

now I know I was busy helping move the stuff up from his place to Peachtree Street and we put it back down stairs at 147 Peachtree Street. I do not remember the date when this occurred. I do not remember whether it was 1887 or 1890. It was before 1890. It would be difficult for me to fix an occurrence of that kind because it was just running along in the general trend of business. My recollection is that it was in 1888. I could not tell you about what time in 1888, but I remember very distinctly the moving of it up there, because we boys at the laboratory were very much rejoiced that we could get all the "Coca-Cola" we wanted, and we were then putting it up in these little red kegs. My recollection is that it was in 1888 when that forty gallon kettle was moved up there and we were putting up this "Coca-Cola" in red kegs. When I was with them, Mr. F. M. Robinson was doing most of the work then—it was A. G. Candler owned it, and F. M. Robinson really did most of the work getting up the advertising and making the goods. He would make the product like to-day, and next day he would fill it, and he looked after the keeping of the books, of the sales of "Coca-Cola"—mostly memoranda, because [337] the sales did not amount to very much, and I was in and out largely selling, sometimes helping him down there when he needed help.

Re-redirect Examination by Mr. ROGERS.

When I moved that kettle up from Marietta Street to Peachtree Street we also moved some material up there and some printed matter—odds and ends

of advertising matter—and the small stuff that had been gotten out. Most everything was hand-made at that time.

"Re-Red.Q. 2. Just everything that had anything to do with 'Coca-Cola'?

"A. Just everything that had anything to do with 'Coca-Cola.' We went down there with a one-horse dray; I remember the incident quite clearly though I do not remember the date."

Everything that had been used down there we moved to the basement of 147 Peachtree Street—we cleaned the thing out and took it to 147 Peachtree Street, which was the address of A. G. Candler & Company, wholesale druggists.

Re-Recross-examination by Mr. LITTLETON.

I knew what Dr. Pemberton used down there in the chemical business. I knew presumably everything that he had and used in the "Coca-Cola" business—it was all turned over to us and we moved it up there. The way I know that everything which he used in the "Coca-Cola" business was turned over to us is that I would not assume that he would hold out anything on us. In other words, all I know is that we moved out from that building, when we went down there, what was turned over to us by old man Walker and that crowd. Mr. Robinson can give you more definite information on that than I can; he was there at the time. My recollection is that Dr. Pemberton was not even there at that date, he was very ill at that time.

Deposition of W. L. Sams, for Plaintiff.

W. L. SAMS.

Direct Examination by Mr. ROGERS.

I am twenty-six years old; my address is Atlanta, Georgia, care of the Coca-Cola Company, by which company I have been employed [338] since January 1, 1914. Prior thereto I was about seven years in the drug business—about three and a half years on the road for John Wyeth & Sons. I dispensed soda-water from the time I was ten years old between school terms until I finally got in the drug business. I was a dispenser at Jackson, Georgia, my home town, and at Griffin with Carlisle & Ward, and at Newman with Holt & Kates. Since I have been with the "Coca-Cola" Company it has been part of my business to travel for them portions of Florida, Georgia, East Tennessee, from Chattanooga, into the State of Virginia, portions of West Virginia and part of Maryland. I call on soda-fountains entirely and bottlers. I have made a practical study of people asking for drinks all my life from a retail standpoint in the drug business right up until I went with the Coca-Cola Company. The study was not any stronger, but as strong, since I have been with the Coca-Cola Company. I have been familiar with "Coca-Cola" since I was big enough to look over the counter and look up to the dispenser and ask for it.

"Coca-Cola" all my life has had nicknames, and I have all my life asked for "Coca-Cola" by nicknames, meaning "Coca-Cola"; namely, "dope" and

(Deposition of W. L. Sams.)

"koke," which was taught to me by the public from hanging around soda-fountains. And then, at the age of ten, going to work with the Jackson Drug Company and dispensing "Coca-Cola" when "dope" and "koke" was asked for by the public, I always found that "Coca-Cola" being dispensed gave satisfaction and was what they wanted.

(Testimony as to nicknames objected to by defendants because irrelevant and not warranted by the pleadings. Overruled. Exception.)

The words "koke" and "dope," as applied to a soft drink, mean "Coca-Cola."

(Objected to by defendants as irrelevant and not warranted by the pleadings. Overruled. Exception.)

When, as a dispenser, I dispensed "Coca-Cola" in response to a request for "koke" or "dope," it has never been rejected as not what the purchaser wanted. They have frequently told me that I did not put [339] enough "dope" or "koke" in it, meaning "Coca-Cola" syrup. In my travels above referred to I have never observed any advertising of any soda-fountain beverage under the names "koke" or "dope," and I have traveled week in and week out behind people that were supposed to be selling "Koke" and "Dope," and they never put out a piece of advertising and I never saw any in my life from the time I have been with the Coca-Cola Company and from the time I started at ten years behind the soda-fountain. The man who was selling "Koke" and "Dope" represented the Koke Com-

(Deposition of W. L. Sams.)

pany of America. That is the way his card reads. Exhibit #65 is the card referred to. It was given or handed to me by one of my customers ten minutes after Mr. J. Frank Peck called upon him and left his card stating that he would enter suit if he dispensed any other product but his product when "Koke" and "Dope" was asked for. I came in, he smiled and handed it to me, told me what they were going to do, and I smiled and told him that I did not think they would, and he said "I know they won't because I have been dispensing 'Coca-Cola' for 'koke' and 'dope' all my life and know it to mean 'Coca-Cola,' and that is what the public mean when they ask for it."

(The alleged statement of the dealer to the witness is objected to by defendants because hearsay. Objection overruled. Exception.)

(Plaintiff's Exhibit #65 was here tendered and offered in evidence by plaintiff.)

Cross-examination by Mr. LITTLETON.

I am now advertising man and salesman for the Coca-Cola Company. I represent them in every department that I know how and am capable of doing in my territory—anything from dressing a window down to taking an order. What I tell dealers who are handling other drinks of a similar nature to "Coca-Cola" when I run across them depends upon what it is, that is, whether it is an advertised piece of goods or not. If I run across one, advertising for which I have not seen, I do not have to tell him much,

(Deposition of W. L. Sams.)

he admits that he is dispensing a cola drink for "Coca-Cola." [340]

(Exception by defendants because answer is unresponsive to the question.)

I cannot answer that question as to what I tell him because there is no two men that their human natures are alike and I do not approach every man I call on alike—I am not a poll-parrot, I cannot do it, I cannot approach them that way. I cannot answer your question—that kind of a question—because I do not take a note-book and jot down every line I say to a man that I call on as a salesman, and there is no human being on earth that uses the same line of talk—no salesman. I never saw a card similar to Exhibit #65 that was not given out by Mr. J. Frank Peck, and he evidently gave out those cards only to the men that he called on in my territory because that is the only place that I ever saw one, and he only left one in each place. I did not take any count of the number of such cards I have seen, nor of about how many. I know I have seen more than one. I do not know whether I have seen two hundred, three hundred, five hundred, but I have seen about ten, no more and no less. This is not advertising in my estimation. Mr. J. Frank Peck used it as a card of introduction to the trade direct—to the proprietor—he never gave it to the soda dispenser to put up, nor gave it as a piece of advertisement. It was used by him personally as an introductory card to the proprietor of the store or bar. I have seen no advertising matter of the Koke Company of America except this in-

(Deposition of W. L. Sams.)

troductory card of Mr. Peck's.

I have observed soda-fountain beverages dispensed at soda-fountains ever since I was ten years old. The most and biggest one that I have ever observed is "Coca-Cola." Among others are grapejuice and limeades and lemonades, chocolate milk, buttermilk, and ice creams, strawberry soda and raspberry soda, lemon soda—and, in fact, a good many others that I might think of. Yes, sir, root beer, sarsaparilla, ginger-ale, cream soda. I worked in the south and never dispensed any "Moxie." No, root beer, during the time I have known it, has varied in color. Every man makes it with a different color, with the exception of Hires' Root Beer, and that is the only one I have seen with [341] the same color. Some of the root beer I have seen was light, some dark, but Hires' Root Beer had the same color all the time, you could not distinguish any difference in the color.

Why, yes, sir, I have seen root beer when I was ten years old that had the same color it has today.

Sarsaparilla also varies in color on account of being made by different people, yet I have seen sarsaparilla during the time I have been in business of the same color it is today. Yes, sir, I have seen "Moxie" and it is similar in color to sarsaparilla and root beer. I have never seen birch beer, "Brew" or "Grapvine." At the soda-fountain where I worked they made root beer from root beer extracts, that's sold by all soda-fountain supply houses, and they made sarsaparilla syrup, also, yes, sir. That extract of root beer is a

(Deposition of W. L. Sams.)

dark color similar to the syrup—they call it similar.

Mr. HIRSCH.—General objection to this line of cross-examination.

Deposition of George J. Martin, for Plaintiff.

GEORGE J. MARTIN.

Direct Examination by Mr. ROGERS.

I am thirty-one years of age, reside at Newman, Georgia. I am a traveling salesman for the Coca-Cola Company and have been such since the latter part of February, 1906, except for a short interval when I was with the Upjohn Company, of Kalamazoo, Michigan. Since I first went with the Coca-Cola Company it has been my business to call upon the soda-fountains and jobbers, and when I was with the Upjohn Company I was calling on the drug trade and doctors and also retail businesses. When I first went with the Coca-Cola Company I worked a portion of North and South Carolina and Tennessee, Kentucky, Ohio and Michigan. In the summer months I confined myself mostly to Michigan, half of Wisconsin, Indiana and Alabama. In the winter months I worked into the territory from Canada to Florida. I worked some in Canada during that time, and, since I went with the Coca-Cola Company the second time, I worked towns from Jacksonville to New Orleans and from New Orleans to Savannah, with the exception of Atlanta. I have worked Chattanooga, Birmingham, Meridian, Montgomery, New Orleans, Mobile, Columbus, Macon, Jacksonville [342] and Savannah. Up until a year ago I worked a good many smaller towns, such as Selma,

(Deposition of George J. Martin.)

Cordele, Americus, Waycross, Brunswick, Tuscaloosa, Greenville, Alabama, and such towns as that, 5,000 to 10,000 people. I called on the same class of trade in these various towns. In practically every instance I call on all the soda-fountain people at these various places, unless I get a man who is a substituter and so obstinate that he absolutely refuses to sell "Coca-Cola," and in some instances I ignore him, because I do not want to give him a sign.

I have been about soda-fountains during the time specified in the territory named and have heard people ask for drinks and know the names they use. As a result of my observation and experience the name that is used mostly in my territory in asking for "Coca-Cola" is "dope"—that is the one that I have heard for years; and another one that is used frequently is "coke."

(Objection by defendants to the testimony with respect to nicknames because irrelevant, immaterial and not warranted by the pleadings. Overruled. Exception.)

The words "coke" and "dope," as applied to a soft drink, mean "Coca-Cola."

Mr. LITTLETON.—"We object to that for the same reason. Note a general exception to all that line of examination."

Mr. HIRSCH.—"That is all right, we are willing for you to note a general exception to all such questions to save repeating the objections each time.")

I have never seen any advertising of any soft drink under the name of "Dope" or "Koke." I have

(Deposition of George J. Martin.)

known "dope" for about fifteen years, and have heard it constantly, almost daily, ever since. I think the first time I ever heard the word "koke" used, I used it myself. It was during the time I was with Upjohn & Company in Tennessee—I am a good hand to call anything by the shortest name I can, and I go in myself and ask for a "coke." At that time I had never heard anybody else call for it by the name of "coke," but I have heard it for the last seven or eight years, or five or six years, [343] many people go in and call for "dope" or "coke"—the majority of the people in my territory will ask for "dope." When they ask for "dope" they want "Coca-Cola." I was dispenser down here a good many years ago,—ten years ago—possibly eleven,—down here at Newman for Holt & Kates, and the majority of people that came in would say "give me a dope." I sold them "Coca-Cola" because Holt & Kates had nothing in the house in the way of a syrup except "Coca-Cola" syrup. None of these people who came in and asked for "dope" and got "Coca-Cola" stated that that was not what they wanted. I understood that they meant "Coca-Cola" when they asked for "dope."

Cross-examination by Mr. LITTLETON.

I won't say that I have never in all my life seen any cola or caffeine-containing soda-fountain beverages advertised under the name of "Dope." I don't recollect any, I don't know of any. No, sir; I have not since I have been with the Coca-Cola Company. I do not know of noticing any before that,—I heard it rumored years ago, it's been twelve years ago, here in

(Deposition of George J. Martin.)

Atlanta, Georgia, a thing came out and they called it "Dope," but it did not last but a very short time before it was 'squashed,' but I never seen any since nor did I ever see it advertised. I did not say it was advertised; the only thing I heard was that a drink called "Dope" was on the market. I do not know who it was manufactured by. The only time I heard about it, I went to a soda-fountain and asked for a "dope" myself and the boy said, "Don't call for 'dope,' you might get stung, call for 'Coca-Cola.'" I was pretty young, I did not know anything about the business world, Coca-Cola Company or anything. The first I ever heard the name "koke" applied to any soda-fountain beverage was something like six or seven years ago when I, myself, applied for that.

[344]

Yes, I heard the rumor that went around that "Coca-Cola," the product manufactured by the Coca-Cola Company of Atlanta, Georgia, contained cocaine.

(Objected to by plaintiff because irrelevant and incompetent and not based on direct examination of the witness.)

It was during the time—1907—that we had some trouble with the Government. I read several articles at that time about what Mr. Wylie had said it contained. Yes, I have run across people who thought it contained cocaine. I ran across one man up in Michigan and he and I had a very long argument about that.

(Deposition of George J. Martin.)

(Objected to by plaintiff as irrelevant and immaterial.)

Oh, yes, sir, I hear "Coca-Cola" asked for as "a shot" or "a shot in the arm." If I ever heard anybody ask for it as "poison"—"give me a poison"—I do not recollect it.

(Same objection by plaintiff.)

Yes, in my experience as a traveling man visiting druggists and soda-fountains over the country I have observed other beverages dispensed from soda-fountains of a similar color to "Coca-Cola." "Koke" and "Dope"—it has a similar color to "Coca-Cola." "Gay-Ola" had a similar color, and I have seen several substitutes on the market that had a similar color. I say "substitutes" because it is something that people put off in the place of the other—something that people put out to take the place of the genuine,—that's what I believe. In fact when I was in the business I knew it—well, I knew it as well as I know anything, because if I ever went into a store before I went to work—that is during the time I was away from the Coca-Cola Company, and asked a man for "Coca-Cola" and was served anything else, he and I had a fuss right there and then, even with my best friends. I went to a place in Nashville and called for a "Coca-Cola" and he served me with another article and he and I had an argument and it resolved into a bet, that's how firmly I knew it. I had never heard anybody [345] walk up to a fountain and call for any of these substitutes by their regular name. The only way they have been

(Deposition of George J. Martin.)

sold is when they ask for "dope" or "koke" and that would be pushed out and nothing said.

The first time I ever saw root beer dispensed from a soda-fountain was ten or fifteen years ago. The first "Coca-Cola" I ever had was about seventeen or eighteen years ago at old Dr. E. B. Terrell's drug-store at Greenville, Georgia,—I remember it distinctly. I did not know what root beer was then. Oh, yes, I had seen sarsaparilla. I do not remember whether that was about the same color then that it is today. I have never studied the colors of sarsaparilla and root beer. No, sir, it was not white, it was kind of red—something similar to a dark brownish red. I would not say it was the color of "Coca-Cola." Root beer is not the color of "Coca-Cola" at all,—that is, the root beer I have always seen. In the first place it foams like beer—that is, the root beer I have drunk—and another thing it is darker. I could not answer as to whether it would appear similar to the color of "Coca-Cola" to a casual person looking at it in a soda-fountain. No, sir, I never thought that. It has never occurred to me at all. I would not say that there is a big wide difference in the color of root beer and "Coca-Cola." I never gave it a thought. I never compared the two,—they are so different in taste. The only drink I ever compared with "Coca-Cola" was something I thought they were putting out as an imitation. I have seen a product on the market known as "Afri-Cola." That's a similar color to "Coca-Cola." The first time I saw that was two or three years ago. I do not think it

(Deposition of George J. Martin.)

tastes like "Coca-Cola." Every time I have been served with an "Afri-Cola" yet I have always distinguished—always proven—twice lately—that the man was selling "Afri-Cola" for "Coca-Cola." I always have told the difference in taste immediately. Well, I won't say that I am an expert on the taste of these drinks. That depends on a great many things—some days if I am in doubt about my taste I might go back to the same fountain several days so as to be sure. [346] Suppose my liver is out of order, then my taste would be affected, and I would go back there may be every day for a week, because I would never want to accuse a man unless I knew I was right. I would say "Gay-Ola" is something similar to "Coca-Cola" in a way. Yes, I have seen "Ko-Nut" to know it, in about three years, and that one was about the worst drink I ever got in my life, and it was blacker than "Coca-Cola," but since then I have seen "Ko-Nut," but not drunk it, and they have changed the color. It was not the same color as it was two or three years ago. That is my opinion, however.

Yes, I have noticed the kinds of barrels that "Ko-Nut" and "Afri-Cola" are shipped in—in fact it is just as near an imitation of the "Coca-Cola" barrel as your eye could see—a red barrel minus the label. Yes, I have seen other so-called "cola" beverages or caffeine containing soda-fountain beverages shipped in barrels of the same color as "Coca-Cola." One is "Koke"—I saw three of them. It was here in town, and I, on first sight, or anybody, would have thought

(Deposition of George J. Martin.)

it was a "Coca-Cola" barrel, until I examined it and found there was no label on it. I saw one out from Jacksonville at Pueblo Beach and the reason I knew it was a "Koke" barrel, I asked the proprietor what was in it. When I first asked him, he said it was a "Ko-Nut" barrel. I said, "How do you know"? and he said, "I will get the bill of lading and show you," and it was not "Ko-Nut" but it was "Koke,"—so he himself was mixed up until I saw his bill of lading from New Orleans. I do not recollect having seen "Wise-Ola" barrels. I have never inspected "Rye-Ola" barrels closely. I have never been troubled with "Rye-Ola" in my territory. Most of it, I think, is sold in bottles, so I have never had occasion to examine the bottles. Yes, I have drunk "Koke."

"XQ. 55. You could tell right off it wasn't 'Coca-Cola,' couldn't you?

"A. Well, of course, I got it out of a 'Koke' bottle—

Mr. HIRSCH.—"We object to this line of examination for the reason stated in our former objections.")

"He told me it was a 'koke' and I drank it. He said, 'I [347] want you to try it' and got it, and I tasted 'Coca-Cola' also, and it was similar, it was similar to 'Coca-Cola.' If he had given it to me, and I hadn't seen the label on it, I don't know what I would have thought."

Redirect Examination by Mr. ROGERS.

In my cross-examination where I have referred to

(Deposition of George J. Martin.)

"Coke" barrels and to "Koke" in bottles, I was referring to the product of the Koke Company of America.

"ReDQ. 2. Will you state whether the word 'Coke' to the public, consumers of beverages, refers to this product, or is it a nickname for 'Coca-Cola'?

"A. Why, it is a nickname for 'Coca-Cola.' I never knew there was a product on the market by that name until this year."

Recross-examination by Mr. LITTLETON.

Here are some of the customers that I called on in my territory, and we took addresses of the customers who came in there and what they called for. There was about forty. These are taken from the Midland Pharmacy, Macon, Georgia. I saw Mr. Green, who was the head prescription man, and also Mr. Mack, the manager, and asked these gentlemen what they would give a man when the word "coke" or "dope" was called for. "Why," he said, "I have not got anything in my house but 'Coca-Cola,' and they have been calling for that for years." I said, "I would like to prove that statement"—that we would like to find out absolutely what they want. So each one that called for "dope" I would have the dispenser ask what they meant, and every man that asked, and who was asked back, would say "Coca-Cola," and, as one man expressed it, "What in hell do you think I would walk four blocks for but 'Coca-Cola'?" And I went over to Lamar-Washington's drug-store and the same thing happened there. Never yet, in all of my experiences, has a single man, when asked what he

(Deposition of George J. Martin.)

meant by "dope," said he wanted anything other than a "Coca-Cola"—they would all say "'Coca-Cola,' certainly." I did not say that every man who calls for "coke" or "dope" means "Coca-Cola." [348] I said every man I had interviewed or had anything to do with, every man that has come into my personal knowledge, has always come back and told me that.

Deposition of F. M. Robinson, for Plaintiff.

F. M. ROBINSON.

Direct Examination by Mr. HIRSCH.

I reside in Atlanta, Georgia, Briar Cliff Road. I came here from Lyons, Iowa, in December, 1885, accompanied by Mr. D. D. Doe. At that time I was interested in a chromatic printing device with Mr. Doe and we were going around looking to make some arrangements for disposing of that printing device. In looking over the patent medicine advertisers here in Atlanta we came in contact with Mr. J. S. Pemberton and Ed. Holland, associated together in the medicine business called, then, the J. S. Pemberton Company. We presented our advertising device to them and, in discussing that matter and other matters in connection with the patent medicine business, they proposed an arrangement whereby we should unite our enterprises into a stock company. Messrs. Pemberton, Ed. Holland, D. D. Doe, and I, then formed a stock company known as the Pemberton Chemical Company, a copy of the charter of which is the paper exhibited to me. After this corporation was started the amount of business done was small. Dr. J. S.

(Deposition of F. M. Robinson.)

Pemberton had been, in previous years, a druggist, but he was then what you might call a manufacturing chemist. He put into the corporation several preparations the principal of which was "Pemberton's French Wine of Coca," which was a patent medicine selling at a dollar a bottle, and there was a preparation called "Gingerine," "Indian Queen Hair Dye" and "Pemberton's Globe Flower Cough Syrup." During that period Dr. Pemberton was continually experimenting on other drinks and chemical combinations. Well, he was not compounding anything particular at that time, I think, outside of these that were put into the business and until the time of this preparation, "Coca-Cola." The preparation, "Coca-Cola," was not made immediately after the organization of said company, but several months afterwards it was, some five months, I [**349**] guess, after this charter was applied for. We commenced making what we called "Coca-Cola" in May, 1886. I was assisting in the manufacture of "Coca-Cola" and in putting it on the market and selling it. Well, they continued in business, I suppose, a year—I do not remember definitely, I could find out, perhaps—after that, selling these various preparations, including, after May, 1886, "Coca-Cola." This product had no name in the beginning,—it was being experimented upon. Dr. Pemberton compounded a preparation, it was taken down to Mr. Vanable's soda-fountain for the purpose of trying it to ascertain whether it was something the people would like or not, and, after

(Deposition of F. M. Robinson.)

they had made various changes in the compound, it seemed to be satisfactory and then the question came up with reference to having a name for it. There were four of us in the corporation and they agreed to submit four names, each one of the members submitting a name. I submitted the name "Coca-Cola" and it was afterwards adopted and used. At that time we were doing a small business in everything. The purpose of this drink "Coca-Cola" was to use it at soda-fountains as a beverage. I suppose D. D. Doe was in the business perhaps nearly a year, and he and myself jointly owned this printing enterprise and put that in as our part of the formation of this Chemical Company. After being in, perhaps, something like a year, Doe sold out his Chemical Company interest, surrendering his stock and taking the printing enterprise and carrying it away with him. I do not know as anybody came in immediately after that, but subsequently a man by the name of M. P. Alexander came in. Well, after the preparation had been on sale by the Pemberton Company for possibly a year—they were manufacturing it and selling it as the product of the Pemberton Chemical Company—suddenly Dr. Pemberton announced he had secured a trademark on "Coca-Cola" in his own personal name and that it was not the property of the Pemberton Chemical Company, and that he had sold it to Lowndes and Venable, I believe, were the parties. I thought he had no right to sell it, as I regarded it as property belonging to the Pemberton Chemical Company, of which I owned one-fourth interest; and I

(Deposition of F. M. Robinson.)

went to Judge Candler, as an attorney, to see if he did not think [350] I could have my rights maintained, and he looked into the matter, investigated it, and finally came to me and said Dr. Pemberton was not worth anything—there was nothing that was tangible in sight—and he advised me to drop it and give it up. Thereupon, I immediately went out, sold out my stock to Dr. Pemberton. After that I did not have any business until I came into the manufacture of "Coca-Cola" again, very shortly afterwards, for Walker, Candler & Comany. A man by the name of Woolfolk Walker, and Mr. Asa G. Candler, composed that firm. Dr. Joe Jacobs was not a member of that firm that I remember—he had an interest in it before that, I think. I then went to work for Walker, Candler & Company, making "Coca-Cola" at 107 Marietta Street, where the Pemberton Chemical Company had been all through their history, and we continued to manufacture "Coca-Cola" at the same place, but it was taken away from there temporarily. That is the only thing we manufactured at that time.

"Q. 47. You continued right along with the tools and appliances that they had there with Walker, Candler & Company?

"A. Yes, sir.

"(Objected to by defendants because leading and suggestive. Overruled. Exception.)

We used there the same appliances that had been used in the manufacture before—brought back from another place.

(Deposition of F. M. Robinson.)

"Q. 50. That belonged to the Pemberton Chemical Company?

"A. Yes, sir, that formerly belonged to the Pemberton Chemical Company.

(Defendants object to the question and answer because the question is leading and suggestive. Overruled. Exception.)

The paper marked "Plaintiff's Exhibit #67," with the name of F. M. Robinson on the bottom of it, is my signature thereon. I witnessed that paper.

"Q. 53. Did Wolfolk Walker and Mrs. M. C. Dozier sign that in your presence?

"A. Yes, sir." [351]

I continued the manufacture for Walker, Candler & Company as long as they together owned the preparation. After that I went with Mr. Asa G. Candler in his drug-store and the materials and appliances were moved to the basement of his drug-store—it was then, I believe, 63 Peachtree Street, it is not the same number now. I continued the manufacture of "Coca-Cola" and also had charge of his city books in his drug-store. No, sir, the signature attached to Plaintiff's Exhibit #68 is not mine, that is Ed. Holland's. I know Mr. Ed. Holland's signature,—this is a communication that he directed to me during the time of the Pemberton Chemical Company and I was Secretary of the Company.

The paper marked Plaintiffs' Exhibit #69, is a statement made up by myself from such records as we had in the company in regard to the advertising expenses, etc., in the early history of "Coca-Cola"—

(Deposition of F. M. Robinson.)

advertising expenses for advertising "Coca-Cola." This was delivered to Mr. Hirsch on yesterday, the 27th of July, 1914. Plaintiffs' Exhibit #70 is a copy of the record of sales of "Coca-Cola" made by me from the original entries by myself—the quantity and price, beginning with March 9, 1887, and this paper was given by me to Mr. Hirsch on July 27th. That paper has been in my possession since 1887. The three books of records marked Plaintiff's Exhibit #71, I recognize as books having been made up by myself relating mostly to the sales of "Coca-Cola,"—partly in regard to advertising of "Coca-Cola." This record goes back to 1886 and it's to 1900—I think possibly some of them further—1902—I recognize them all as having been gotten up by myself and they were delivered to Mr. Hirsch at some time previous, I do not know exactly when. I recognize the cards marked Plaintiff's Exhibit #72. They are little advertising cards gotten up by myself about 1892, showing the increase in sales of "Coca-Cola."

After I was with Walker, Candler & Company, I remained with Asa G. Candler continuously until the Coca-Cola Company was formed. No, sir, I did not continue in charge of the manufacturing of "Coca-Cola" except for a short time under Mr. Asa G. Candler, while he **[352]** owned it, individually, at which time I was connected with the manufacturing of "Coca-Cola" and the keeping of the city books—while he was in the drug business. After he went out of the drug business I was the advertising man-

(Deposition of F. M. Robinson.)

ager. Immediately after I finished my work with Asa G. Candler, I went with the Coca-Cola Company. I held the office of Secretary of the Coca-Cola Company from 1892, the date of its organization, until last February (1914), twenty-two years. This product under the name "Coca-cola," as I have described it, has been known and sold under the name "Coca-Cola" continuously from 1886 up until the present time.

Cross-examination by Mr. LITTLETON.

As near as I can remember the exact date Mr. Pemberton perfected this drink called "Coca-Cola" was in the month of May, 1886. From May, 1886, until May, 1887, I think he sold 25 or 30 gallons may be, something like that—a very small quantity—mostly sort of experimental. It was shipped in the first place in jugs and cans—some of it was shipped in gallon tin cans, and then a little later in small kegs, which bore printed labels. The product was never called "Coca-Cola Syrup and Extract" in any printing of any kind. He never had any labels printed at that time "Coca-Cola Syrup and Extract" that I remember. It was "Coca-Cola," nothing else. No, sir, I don't think he had on his letter-head "Coca-Cola Syrup." The letter-head on the monthly statement marked and filed as Plaintiff's Exhibit #70, reads "Coca-Cola Syrup," there. That is written in block letters, I suppose you would call it. No, I could not particularly describe the style of labels that he used on his containers containing this product, except it was "Coca-Cola"—prob-

(Deposition of F. M. Robinson.)

ably something in reference to it, in addition. I don't remember whether it said "Coca-Cola" or "Coca-Cola Syrup and Extract"—I never saw the word "extract." I don't think the word "syrup" was attached to any label, within my memory. I remember how the words "Coca-Cola" were written. **[353]**

Yes, sir, I testified in an interference proceeding in the Patent Office in Washington in 1892 in an interference between a man named Kent and another named Beerman and the Coca-Cola Company, and in that proceeding I testified that I originated the word "Coca-Cola." I do not remember that I stated the reasons why I gave it that name.

"XQ. 19. Well, to refresh your recollection, I will ask you whether or not you were asked these questions and answered as follows: '(Q.) Do you know the origin of the word 'Coca-Cola' as applied to a tonic beverage?' '(A.) Yes.' '(Q.) What is it?' '(A.) I was the originator of the word. The syrup was given this name on account of the extracts which it contained, 'coca' and 'cola,' made from coca leaves and from the cola-nut.' Did you testify that? (A.) I expect I did."

Yes, that is true as far as it goes. It only explains in part the object in giving its name,—it was simply to give it a name to be advertised by and to be called for, and the word "Coca-Cola" don't explain what there was in it. I know what the compound is and was. It is true that might have been one reason why the name suggested itself to me, was because

(Deposition of F. M. Robinson.)

of the fact that there was in it the properties of "coca" leaves and of "cola" nuts and that may have been one reason why it was given that name; but the object in giving it its name was to have a name to be advertised by, and called for, and things of that kind, and not a description of the contents—there was dozens of other things that went into it that don't appear in the name. I don't deny now that I swore in this Washington proceeding in the Patent Office that I gave it its name on account of the extracts that went into it, do I? I am giving you additional reasons why the name was given to it.

No, I did not get mad and go out of the business along about the time Dr. Pemberton had a registration of the "Coca-Cola" label or trademark in the Patent Office. I felt that I was being defrauded of my rights, and that the product belonged to the Pemberton Chemical Company, and that I had my rights in it, and went to Judge Candler, as I **[354]** stated a while ago, and asked him about defending my rights and he advised on account of circumstances and conditions just to let it drop, and I did. I expect that was about July, 1887. I sold my stock in the Pemberton Chemical Company, as I remember, to the Pemberton Chemical Company, that is, I sacrificed my stock—gave it up. At that time, besides myself and Dr. Pemberton, Ed. Holland and M. P. Alexander owned stock in the Pemberton Chemical Company. The next I had anything to do with this same product was Walker-Candler & Company. I don't remember the date. I presume it was

(Deposition of F. M. Robinson.)

August, 1888—the date is here in these records and papers. I was out for a month or such matter after I left the Pemberton Chemical Company, and it was not very long until this Walker, Candler & Company started up—I don't think it was more than a month that I was out entirely. While I was with Pemberton in the Pemberton Chemical Company, before I got out, we were all interested, just at the beginning, in the making of this "Coca-Cola" and I compounded—I mean that I assisted him in the compounding and mixing and heating of the preparation—the cooking that was necessary. No, sir, I don't remember who it was we bought our fluid extract of coca from at that time. We bought coca leaves and made it ourselves. No, sir, I could not remember the process now by which we extracted or made the fluid extract of coca. Dr. Pemberton was the chemist in the matter. I am not a chemist now, was not then, never have been, and don't claim to be. I just stood around the place where he was making it and helped to put the ingredients in. There was not much machinery used in making this product. There had to be percolators in making these fluid extracts and there was a brass kettle containing, I think, forty gallon capacity,—not much in the way of machinery, at that time. He mixed it with a paddle, just in the kettle. Yes, sir, I helped him make "Pemberton's French Wine Coca." Yes, sir, he used coca and cola nuts in the preparation of that, and a wine. Well, the sales of "French Wine Coca" were fairly extensive, we thought it was pretty good

(Deposition of F. M. Robinson.)

when we went into it. That was his leading article at that time. **[355]** "Coca-Cola" was not a side line, but became the leading article almost immediately after it's manufacture and everything else almost laid aside after it's manufacture, but the "Wine of Coca" was the principal thing when we went into it. Yes, sir, from July to October or November, 1887, "Coca-Cola" was his principal product and "Wine of Coca" just dropped back. The thing he was pushing all the time was "Coca-Cola." I remember there was very few barrels shipped at that time, but I think they were the same color as now—they were painted red. No, I don't remember the kind of lettering he used on his tags and labels for "Coca-Cola" back there in 1886 and 1887. I would not be able to describe the label except that the word "Coca-Cola" was always the prominent thing. Yes, sir, "Coca-Cola" was just printed on there, just a printed label. No, it was not in block letters, the word "Coca-Cola" always had the same form from the very beginning. I was practically the originator of that form. Some engraver here by the name of Frank Ridge, was brought into it and he and I worked out that form of that word "Coca-Cola," and when this label was registered in the Patent Office it was registered in that same form. This "Wine of Coca" I refer to was of a dark red color. I don't know that I could definitely give any information about any other preparations made by others that were similar to that "Wine of Coca" at that time. Preparations of that kind were not numerous

(Deposition of F. M. Robinson.)

at all, there was scarcely anything on the market, so far as my information goes, under the name of "Coca" preparations or "Cola" preparations. Well, my experience in that respect was not so very limited, perhaps. At that time Cola nuts or the extract from cola nuts was a very expensive article and very little in use, that is my understanding of the matter.

No, sir, I did not know at that time the product similar to this made from coca and cola nuts by Parke, Davis & Company, but I have some knowledge of a preparation being made by Mariani & Company, I don't remember the name of it now. No, sir, I do not know of any similar preparation made by Myer & Company or by Balfour, of Boston. **[356]** I could not give absolute testimony as to whom we purchased our coca leaves from at that time. I think Parke, Davis & Company, probably, but I am not certain. I could not tell you from whom we bought our cola, we bought cola-nuts mostly.

I am now a stockholder and director in the Coca-Cola Company. I resigned in February of this year (1914) as Secretary, and William Candler succeeded me as such.

No, sir, when I quit the Pemberton Chemical Company and withdrew from it, Dr. Pemberton did not continue to manufacture "Coca-Cola." Before I left it was taken away to Jacob's drug-store, I think it was, that is, whatever they had for the purpose of manufacturing "Coca-Cola."

(Deposition of F. M. Robinson.)

"XQ. 72. And are you positive that Dr. Pemberton did not continue to manufacture aything like that there?"

"A. He sold it and the stuff was taken away, that is as far as I can give you information."

It was taken away immediately after the sale. You have the dates of sale here in the record. I mean the sale to Venable & Lowndes. No, sir, after that sale to Venable & Lowndes, Dr. Pemberton did not continue to manufacture anything at this place. Directly after that, I don't know just exactly how soon, they moved away from that place and they formed the Pemberton Medicine Company—I don't know that that is my business to be giving you—they moved away over here. I have lived here continuously since then. Dr. Pemberton and some other gentlemen formed the Pemberton Medicine Company sometime after that. I think they operated on South Pryor Street. They did a medicine and extract business, they manufactured these articles that are enumerated there in the Pemberton Chemical business. I think they did manufacture drinks —Cola's—to some extent but have no personal knowledge. We considered the demand for "Coca-Cola" good at that time, it would not be now. The records show about how much "Coca-Cola" was sold in 1888. I don't remember how much, or about how much. In 1888 we were doing [357] business at 107 Marietta Street for Walker, Candler & Company. At that time the Pemberton Medicine Company was somewhere on Pryor Street, I think. I was engaged

(Deposition of F. M. Robinson.)
in the manufacture of "Coca-Cola" and nothing else.

"XQ. 91. And they (Pemberton Medicine Company) were manufacturing similar drinks?

"A. I don't know about that.

"XQ. 92. You knew they were putting different drinks on the market, didn't you?

"A. I knew scarcely anything about it.

"XQ. 93. You knew they were manufacturing drinks and putting them on the market?

"A. I heard they were manufacturing drinks, yes, sir.

"XQ. 94. That was part of the history of the community, that they were doing that?

"A. Yes, sir."

As to the associates whom Dr. Pemberton had in the Pemberton Medicine Company, I just remember that a man by the name of Mayfield was one of them, and a Mr. Bloodworth was another one—I don't remember his name now—Murphy, I guess it was. I have been with the "Coca-Cola" Company continuously since then, and am now a director of the Company. I do not remember what year Dr. Pemberton died. He had a son named Charles M. I don't hardly know whether or not he was connected with the Pemberton Medicine Company. I think so, but I don't know. He died shortly afterwards himself. I don't remember when Dr. Pemberton died, but I remember that he did die about that time. I don't know whether the business of the Pemberton Medicine Company at that same place continued after his death, I don't remember.

(Deposition of F. M. Robinson.)

Yes, sir; I said the kettle was moved from 107 Marietta Street about the time I got out of the Pemberton Chemical Company—I don't know about the kettle being moved, I am not so sure, but I think it was. I mean all the things that Pemberton owned were moved to Jacobs' basement—Venable's basement probably might be better. Venable and Jacobs were in the same building. Venable had the soda-fountain business in Jacobs' drug-store. Yes, sir; those things stayed there [358] a short while until Walker, Candler & Company began to make this product. I don't know about Mr. Dobb's personally going down to 107 Marietta Street in 1888 and removing all of the appliances for making "Coca-Cola," which Dr. Pemberton had used, to Asa G. Candler's place of business. I don't know that part of it—that is something I don't know, sir. If they had been moved in July or August, 1887, they could not have been moved again in 1888, no, sir.

When I was associated with Dr. Pemberton, I had some knowledge of the soda-fountain business, just here. I suppose sarsaparilla was sold at that time, but I don't remember. I don't remember about root-beer, birchbeer, or ginger-ale, either, I could not remember about them. I don't remember any other drink on the market at that time of the same color as "Coca-Cola" is now, or substantially the same color. I expect there was, but I don't remember it, I don't know anything about it. No, I don't know whether "Coca-Cola" was the only drink on the market at that time of that same color. I know there is such

(Deposition of F. M. Robinson.)

a firm as Hagan & Dodd in Atlanta, but I am not personally acquainted with them. I could not tell you how long, or about how long, they have been in business. I have known this firm, I expect, ten or a dozen years, maybe more, I don't remember. I see by the papers they are making a product called "Ko-Nut." I don't know anything about that. No, sir, I have never seen any "Ko-Nut," I would not know it if I was to taste it. I have seen their wagons carrying that stuff on the streets. I don't know the color of their barrels or kegs; I don't know as I ever saw any of them. I don't know the color or the taste of that drink. Just to make a guess at it, I would imagine I have seen Hagan & Dodd's advertising, either "Ko-Nut" or "Afri-Cola" about ten or a dozen years. It has been a good while. During all of that time I was Secretary of the Coca-Cola Company. I do not know how long the drink called "Rye-Olo" has been on the market. No, sir; I don't know any more about that drink than I do about these others, I don't know anything personally about it. No, sir; I don't know that I have seen any of it. **[359]**

Redirect Examination by Mr. HIRSCH.

The other products that were gotten out by the Pemberton Chemical Company, aside from "Coca-Cola," were "Pemberton's French Wine Coca," "Globe Flower Cough Syrup," "Indian Queen Hair Dye," and a preparation called "Gingerine." So far as I know it went from the Pemberton Chemical Company to the Pemberton Medicine Company.

(Deposition of F. M. Robinson.)

Those preparations were medicines, not beverages. In stating in my cross-examination about other objects we had in mind in giving the name "Coca-Cola" to the product, I meant that I didn't regard it as describing the properties in the syrup because there were maybe a dozen other ingredients that also went into it. I just simply took that as a name, similar to other advertising names, thinking that two "C's" would look very well in an advertisement, and called it "Coca-Cola." During the time I was with Dr. Pemberton, and the Pemberton Chemical Company, he was always experimenting on various things. He was experimenting very much with this drink called "Coca-Cola" for some considerable time.

"ReDQ. 10. He sold the 'Coca-Cola' business to Venable & Lowndes, did he not?

"A. Yes, sir."

(Defendants object to the question and answer because the question is leading. Overruled. Exception.)

Well, my understanding is, he sold it to Messrs. Venable & Lowndes. Dr. Pemberton told me he had sold it to Venable & Lowndes. It is my understanding that Venable & Lowndes actually took the business over.

"ReDQ. 17. To your knowledge did Pemberton actually deliver the material to Venable & Lowndes for manufacturing 'Coca-Cola'?

"A. Yes, sir."

(Objected to because leading and suggestive.

(Deposition of F. M. Robinson.)
Overruled. Exception.)

It went into the basement of Jacobs' drug-store, in Venable's department at the corner of Marietta and Peachtree Streets. From that place it went back again to 107 Marietta Street and from there it went to Asa G. Candler's drug-store, 63 Peachtree Street. [360]

Recross-examination by A. B. LITTLETON, Esq.

No, sir, I did not witness the sale of the "Coca-Cola" business by Dr. Pemberton to Lowndes and Venable. The statement of Dr. Pemberton, and the place where it went to, is the source of my knowledge on the subject. As I remember it, all the material for the manufacture of "Coca-Cola" went there. No, sir, I was not connected with Lowndes and Venable. No, I could not swear that all the material landed there. No, I don't know that I could testify as to whether or not Dr. Pemberton sold a part of that material to other parties. No, I have no knowledge of whether or not he transferred it to other people contemporaneously with the transfer to Lowndes and Venable. No, sir, I don't know what Pemberton, Mayfield, Murphy and Bloodworth manufactured. I did not investigate it. I don't think I was ever in their place of business. I don't know how much of this "Wine of Coca" and cough syrup they manufactured. They only knowledge I have as to whether or not they manufactured any cola syrups was acquired by observation. Yes, I observed that just like I did Hagan & Dodd's, what comes out. No, I don't know anything about the quantities they man-

(Deposition of F. M. Robinson.)

ufactured or sold, but I know just as well as I know that Hagan & Dodd manufacture "Ko-Nut," but I don't know anything about the extent of it.

In referring to the fact that all the "material" for making "Coca-Cola" was removed, I mean coca leaves, fluid extracts, cola nuts, percolators, and everything of that kind,—everything that was used in the manufacture. Well, Dr. Pemberton had percolators and things of that kind in his place of business at that time for making "Wine of Coca" and these other products—some of the same material, perhaps, went into both. I could not tell you how many percolators he had, but he had quite a number of them. Percolators are made in any size, probably these might have been eight or ten gallons capacity,—something of that kind,—and he had quite a number of them. He had a mixing tank for the "Wine of Coca" preparation. He did not mix the "Coca-Cola" in that. **[361]** The "Coca-Cola" was mixed in the kettle—I don't know but there was some "Coca-Cola" manufactured in the same tank, mixed in the same tank as the "Wine of Coca," possibly. When he moved all the materials he moved all his coca and cola over to Lowndes & Venable's. No, he did not sell the "Wine of Coca" business to Lowndes & Venable. Yes, coca leaves and cola nuts were used in manufacturing "Wine of Coca." Yes, so far as I know he kept on making "Wine of Coca" there—not there, that was taken to this other place. After that he made it down on Pryor Street, somewhere. Directly after he sold to Lowndes & Venable—that was

about July, 1887—he moved, shortly afaerwards (and before September or October, 1887) to South Pryor Street, I don't remember the number of the place. I could not testify as to whether or not he took any coca or cola nuts down to South Pryor Street with him. I did not say that all the coca and cola nuts he had at 107 Marietta Street went to Venable & Lowndes. I don't know how it was divided. The fact of the business is it has been so long ago that my recollection of what did go to Lowndes & Venable—it is hard to remember that far back, and my recollection is very hazy on that.

Deposition of Oscar Cliff Hightower, for Plaintiff.

OSCAR CLIFF HIGHTOWER.

Direct Examination by Mr. ROGERS.

I am thirty-one years of age, reside at Columbia, South Carolina, am traveling for the Coca-Cola Company, and have been doing so for the past three years. Before that I was with the Blue Seal Ice Cream Company. Since I have been traveling for the Coca-Cola Company, my territory consists of South Carolina and the towns I make are Columbia, Charleston, Greenville, Spartenberg, Anderson, Orangeburg. I call in all towns where they sell "Coca-Cola" from the fount. I call on those dispensing "Coca-Cola," whether confectionery stores, supply stores, drug-stores or otherwise. Yes, sir, I am about the soda-fountains in these varions stores and know how people ask for the drinks they want. **[362]** In traveling over my territory I make the larger cities every

(Deposition of Oscar Cliff Hightower.)

four months, the smaller ones about once a year. I am on the road constantly. Yes, in my experience, and in the traveling referred to, I have discovered that there are nicknames for "Coca-Cola." Yes, sir, "Coca-Cola" and "dope" are the names, nicknames for "Coca-Cola,"—"coke" and "dope," I mean, are the nicknames for "Coca-Cola," yes, sir. The words "coke" and "dope," as applied to a soft drink, mean "Coca-Cola."

(Defendants object to said testimony as to nicknames because irrelevant and not warranted by the pleadings. Overruled. Exception.)

I have never seen a piece of any advertising of any soft drink under the name of "Koke" or "Dope."

Cross-examination by Mr. LITTLETON.

Yes, sir; I have heard "Coca-Cola" called a "shot." No, sir; I don't believe I ever heard it called "powder" or "poison." Yes, sir; I know why the people call it "coke" or "dope"—it's a short name for "Coca-Cola." No, sir; "dope" is not an abbreviation for "Coca-Cola," it's just a short name —a nickname. The word "dope" means various things. A book-maker on a race-horse track—why, they use it in baseball "getting the 'dope' on the players." Yes, sir, yes, sir; I have heard it used in reference to a "dope fiend," applied to a cocaine fiend, yes, sir.

Deposition of M. Tomlinson, for Plaintiff.

M. TOMLINSON.

Direct Examination by Mr. ROGERS.

My age is 25 years, residence, Columbia, Tennessee, occupation, representative of the Coca-Cola Company. I have been connected with the Coca-Cola Company two and a half years and my business consists of anything that the company sees fit for me to do. I travel for it over the state of North Carolina and a part of the State of Virginia. I make the cities of Ashville, Charlotte, Greensboro, Winston-Salem, Danville and into Norfolk. I call on the wholesale and retail druggists and soda-fountain dispensers. Yes, sir; I know the names used by people when they ask for drinks. Yes, sir; I am familiar with [363] "Coca-Cola." Yes, sir, in the traveling, experience, and observation referred to, I have discovered that there are commonly used nicknames for "Coca-Cola," which are "koke" and "dope." The words "dope" and "koke," as applied to a soft drink, mean "Coca-Cola."

(Objected to by defendants because irrelevant and not warranted by the pleadings. Overruled. Exception.)

No sir, I have not seen any advertising of any product under the name of "koke" or "dope."

Cross-examination by Mr. LITTLETON.

No, sir, I don't know of any other cola or caffeine containing soda-fountain or soda beverage on the market today besides "Coca-Cola."

Deposition of Magnus L. Ramey, for Plaintiff.

MAGNUS L. RAMEY.

Direct Examination by Mr. ROGERS.

I am 25 years of age, live in Atlanta, Georgia, and am a representative of the Coca-Cola Company, and have been such for four years. I am a traveling salesman and cover Atlanta, East Tennessee and the northern part of Alabama—mostly confined to Atlanta. I make about 200 small towns, of a population anywhere from 200 to 15,000 or 20,000 and I call on the soda-fountain trade in those towns. Yes, sir, I am familiar with "Coca-Cola." Yes, sir; in calling on the soda-fountain trade I come in contact with dispensers and with the public who frequent soda-fountains, and I know the names they use in asking for the drinks they want, which are "dope" and "koke." When they ask for "dope" and "coke" they want "Coca-Cola" and mean "Coca-Cola."

(Objected to by defendants because irrelevant and not warranted by the pleadings. Overruled. Exception.)

In my travels, experience and observation, I have discovered that there are commonly used nicknames for "Coca-Cola." The words "dope" and "coke," as applied to a soda-fountain beverage, mean "Coca-Cola." No, sir; I have never seen any advertising of any soda-fountain [364] beverage under the name of "Koke" or "Dope."

Cross-examination by Mr. LITTLETON.

Yes, sir, I have heard people say "give me a shot," or "give me a shot-in-the-arm," a few times

(Deposition of Magnus L. Ramey.)

in calling for "Coca-Cola." They ask for it that way just because it is a nickname. "Shot-in-the-arm" is a nickname for "Coca-Cola."

Deposition of Winton Holmes Troutman, for Plaintiff.

WINTON HOLMES TROUTMAN.

Direct Examination by Mr. ROGERS.

I am 24 years old, live in Newnan, Georgia, am a representative of the Coca-Cola Company, and have been for fifteen months. Yes, sir, I travel in their interest over Southern Georgia and Florida, and make about three hundred towns. I call on the soda-fountain trade, druggists, and am about soda-fountains continually. Yes, sir; I observed the names used by people in ordering drinks and am in a position to form an opinion as to what they mean when they use certain language. Yes, sir; I have observed what they get when they use the various names that they may use. Yes, sir; I am familiar with "Coca-Cola" and know how it is asked for. Yes, sir; in the course of my travels, experience and observation, I have discovered that there are commonly used nicknames for "Coca-Cola," which are "dope" and koke." The words "koke" and "dope," as applied to a soda-fountain beverage, or soft drink, mean "Coca-Cola."

(Objected to by defendants as irrelevant and not warranted by the pleadings. Overruled. Exception.)

(Deposition of Winton Holmes Troutman.)

No, sir; I haven't ever seen any advertising of any product under the name of "Dope" or "Koke."

Cross-examination by Mr. LITTLETON.

No, sir; I have not heard the expression "give me a shot," that is not in my territory, nor "give me some poi*u*son." I have heard "Coca-Cola" called "Candler's high-ball," that is the only thing I have heard besides "dope" and "koke." Yes, I have worked towns in Southern Georgia and have ridden on the Central of Georgia railroad and I [365] know the drink they sell on that railroad called "Chero-Cola." Yes, sir, I have observed people buying that drink on that railroad. No, sir, I have never heard them ask for it as "dope" or "koke," they ask for "Chero-Cola." It might be in one or two instances I have heard it asked for as "dope" or "koke," I didnt pay any special attention. Yes, sir, I swear that only in one or two instances during my extensive travels through Southern Georgia, over the Central of Georgia railroad, I have only heard "Chero-Cola" asked for as "dope" two or three times."

(Mr. HIRSCH.—We object to that because the witness did not say any such thing. Overruled. Exception.)

One reason is, when anybody calls for "dope" on the trains they say they haven't got "dope," got "Chero-Cola"—everybody knows "dope" and "coke" is a nickname for "Coca-Cola." No, sir, everybody when they want "Chero-Cola" ask for "Chero-Cola" and don't say "dope" or "koke," be-

(Deposition of Winton Holmes Troutman.)

cause when they ask for "dope" or "coke" they give them "Coca-Cola," because that is what they want. Yes, sir, I know of my knowledge that "Coca-Cola" has been sold when people ask for "dope" and "coke."

Deposition of Asa G. Candler, for Plaintiff.

ASA G. CANDLER.

Direct Examination by Mr. ROGERS.

My full name is Asa Griggs Candler. I was born in Villa Rica, Carroll County, State of Georgia, U. S. A., in 1851. I reside at 61 Elizabeth Street, Atlanta, Georgia, in this county. I have been living in Atlanta since 1873. Around 1885, 1886 and 1887, I was in the drug business on Peachtree Street under the name of Asa G. Candler & Company, probably I was under three different names while in the drug business. First it was Hallman & Candler, and then Howard & Candler, and then it was Asa G. Candler & Company. Yes, sir; I was a member of the firm of Walker, Candler & Company, but that was not in the drug business. That firm proposed to manufacture and sell "Coca-Cola." Yes, sir, I have examined Plaintiff's Exhibit #73 and I recognize [366] the signatures thereon and my name is mentioned therein. The same applies to Plaintiff's Exhibits Nos. 74, 75, and 76. I can tell you exactly the name I was doing business under in a certain year, I can tell you exactly. I told you a while ago what business I was in in 1884, and 1885. That's what I propose to answer—what name I was doing business

(Deposition of Asa G. Candler.)

under in a certain year. In 1884 and 1885 it was A. G. Candler & Company. In 1886, Howard & Candler, I believe, then in 1887 it was A. G. Candler. In 1888 it was Asa G. Candler & Company. In 1889, A. G. Candler & Company. I went out of business—that is, quit buying and selling anything, in 1890—I didn't quit and go out because people owed me, you know. I actively engaged in the business of Walker, Candler & Company, as much as anybody did. I tried to collect for what was sold and saw that the business was attended to. I think I was generally in charge of the business of Walker, Candler & Company, as financial head of it, I don't think Mr. Walker did anything but travel. Oh, yes, I know Dr. J. S. Pemberton well, I was intimately acquainted with him until—why, I suppose Dr. Pemberton felt I was one of his best friends in this town. Yes, sir, I knew him up to his death. I remember the occurrence but not the date of his death.

In 1892 I formed the corporation, the Coca-Cola Company. I was president of the company and have been ever since then, and have been actively in charge of the business right straight along since then, and have kept a general oversight of everything pertaining to the business. The business of the Coca-Cola Company has been, since 1892, the manufacturing and selling of the syrup known as "Coca-Cola." Yes, sir, it has been extensively advertised. I don't think I have ever been to any place in this country that I did not see "Coca-Cola" advertised. One of the first places I ever was in

(Deposition of Asa G. Candler.)

here was Pemberton's drug store, in the Kimball House, that was Pemberton, Pulliam & Company. No, sir, I never was at any place where he was manufacturing goods. No, sir; I don't know what utensils [367] he personally used; I don't remember seeing him handle anything. When I owned "Coca-Cola" individually, F. M. Robinson was continuously with me from beginning to end, overseeing the manufacturing. I didn't attend to the manufacturing, only in a general way. He did that. As a member of the firm of Walker-Candler & Company the same thing happened so far as I can recollect. Yes, sir, I know concerning all these documents you have asked me about. All of them represent the genuine signatures of the parties thereto and the documents are the genuine documents that were passed. The five notes presented to me marked Plaintiff's Exhibit #77, bear my signature. They were given to Mrs. Dozier—my information was she was a sister of Woolfolk Walker—and that was given to Woolfolk Walker (indicating) and that was (indicating), and it was his interest represented in the "Coca-Cola" business.

(Plaintiff's Exhibit #77 was here tendered and offered in evidence by plaintiff.)

Yes, sir; these notes were paid.

Cross-examination by Mr. LITTLETON.

Yes, sir; I had a connection with this product "Coca-Cola" prior to April, 1888. I have forgotten exactly what connection—I don't know whether it is in there—it was as early as 1887. The connection

(Deposition of Asa G. Candler.)

I had was that it was being billed by me and collected by me as late as 1887, then I was doing business as A. G. Candler. No, I do not mean that I was buying it from the Pemberton Chemical Company. I never knew anything I had to do with the Pemberton Chemical Company at all, so far as I know of, in connection with "Coca-Cola," in 1887. Wasn't Robinson manufacturing that up there on Marietta Street—under my direction—isn't there any documents to that effect?—that's my opinion. No, I can't remember without referring to these documents. Let me see what it is—this is way back in 1891—seems to be 1891—what do these indicate here?—my impression is now that I had the whole control of it, as far as the business was concerned, in 1887. [368] I was directing its policy in 1887—in 1888 more and more so. I don't know whether I had bought it or not at that time; I don't know what I had done. These gentlemen got to owing me a great deal of money in 1887, and the whole product had to be manufactured and sold through my business, that's my impression now. No, I didn't own the "Coca-Cola" business, but I controlled it because they owed me enough money for me to control it. I controlled it by seeing that the sales were made and the money was collected by me—I thought you had a date on that, I thought Robinson got up a little pamphlet with the certificates dated 1887. Before 1888 the control I had over it was to see that I got all the money that was sold any goods for. In other words, I think it was the fall of 1887, in those

(Deposition of Asa G. Candler.)

times soda-fountains didn't keep open much after September. My recollection is that I then intervened into the affairs of this Pemberton Chemical Company and took all the "Coca-Cola" they made and sold it out of my own company and collected all of the revenue—that's my recollection of the way it was handled exactly. I was doing that right on up until I took it over, which was evidently August 30, 1888—that's when I took that interest over, I think you will find the Pemberton interest before that. No, I didn't manufacture any personally before 1887. Robinson had manufactured it, collected it all, and did everything else before 1888. Robinson might have been called my agent in 1888. As well as I recollect, it was early, right from the beginning of 1888—as I remarked a minute ago, there was not much done in the soda-water business until the spring. I have a very distinct impression of selling a concern in Columbus on the 31st day of March, dating his bill in April. That was sold by me then under this trade name as far as I can recollect. That's what I remember, selling Howard & Evans, of Columbus, Georgia, a barrel of "Coca-Cola" on the 31st day of March, I think, 1888. Yes, I think that was "Coca-Cola" which I, or my company, had made, I am satisfied it was. No, I don't think I was making "Coca-Cola" before I bought any interest in it. I don't think I did, no, I never was. I don't remember whether I made any "Coca-Cola" before the 31st day of [369] March; no, sir, I am not certain that I made some on the 31st day of March; am certain I sold it on that date. No, I don't know

(Deposition of Asa G. Candler.)

when I began to make it—I don't know a thing about making it. No, I can't come within two or three months of the time in 1888, when I began to make it. I didn't have any company then. Oh, Walker, Candler & Company—well, that company, yes. Does that document show that? I am not going to try to testify about any of these affairs; I thought the document was the best evidence. We were in existence April 14, 1888. I was doing business then, that was it. I can't tell you whether or not I had what "Coca-Cola" was made prior thereto shipped to my drug-store to be sold by me. I can't tell you about the details of that, whether it was sent to my drug store and shipped from there, that I don't remember. What I said about taking all the "Coca-Cola" that was made and selling it myself and collecting the proceeds, didn't mean that I had to bring it to my drug store and ship it, did it? No, I do not remember how I exercised my control over "Coca-Cola." What details do you want? Tell me and I will answer your questions, if I can, as to how I exercised this control. I will do my level best to let you have it, if I can do it. I don't know how I exercised my control over "Coca-Cola," I have forgotten, if I could do it reasonably I would do it. I can't remember all the ways. No, I did not say I did not know anything about the Pemberton Chemical Company. I know they were in existence. There was a half gross of "Wine Coca"; have you got the bill there? I bought a half gross of "Wine Coca." I would not be able to say that that is all I ever bought of that. I expect I bought more of it,

but I know that because I have seen a bill of that lately, it is probably down there in my desk now. No, sir, I don't remember whether I bought in large quantities or small quantities—that's "Wine Coca" —no, sir, because you would probably want to know when I bought it and I don't remember. "Wine of Coca" was labeled "Wine of Coca." I do not remember anything on the label, any legend on there besides the name. **[370]** No, I do not know what that was made of—said to have been made out of coca-leaves and various and divers things, put up in a bottle to be retailed for a dollar. I can't remember whether it was also made of cola nuts; I expect so, but I don't know. My store at that time was both a wholesale and a retail store. The color of this "Wine of Coca" at that time was red. Do I have to answer all that stuff—go into all that stuff? You ask, was "Wine of Coca" a tonic. I don't believe I have to answer all of these things, I don't care to go into it if I don't have to. They claim it was tonic, that's what they said. I have a clear recollection of how it looked *actly,* but I don't know anything about it. Oh, yes; it was a liquid put up in a bottle. My recollection is it was called "Wine Coca." Oh, yes, sir, yes, sir, to be taken internally. My recollection is Dr. Pemberton was doing business in 1887 on Marietta Street, I believe it was in 1887, if he had not moved, he was down on Pryor Street, somewhere down there, he went on Pryor Street, just what date it was I could hardly be expected to recollect that, you know. You ask if in my drug business from 1884 to 1887 I handled

(Deposition of Asa G. Candler.)

any other beverages; now, what do you mean by beverages? We sold liquor and I don't know really what we did sell, really—is that what you mean by beverages? We made no specialty, we sold lemon syrup and sold it by the gross, strawberry syrup and raspberry syrup. No, sir, we did not make any root beer; I don't know whether there was any root beer made in those times. You ask, did we sell sarsaparilla; now, what is sarsaparilla? Yes, sir; I think I do know what it is. I want you to tell me what you mean. I didn't know it was a soda-water beverage. We had a syrup called sarsaparilla and we put it in the soda-fountain and ran it through a tube. I don't remember that we made it, we may have—anybody made it, so far as I know—sarsaparilla syrup. No, sir, I don't remember how I made it at all. The color of that sarsaparilla syrup was brown, I think; you know more about sarsaparilla syrup in a minute than I do; I see you do. Yes, I think it was a dark reddish brown. **[371]** I don't know whether I ever made a drop of sarsaparilla syrup—I don't think I know anything about that. No, sir, I don't know what I used to color it with. No, sir, I did not handle ginger ale at that time; I don't remember that there was any ginger ale at that time, that is my recollection about it. Yes, sir, I think I did handle burnt sugar or caramel coloring. Now, I made a many a batch of caramel coloring—it's a standard coloring matter. In those days it was used in the drug business. I don't know whether everybody used it or not, but I did. No, sir, I did not put it in vanilla flavoring. Vanilla

has enough coloring itself if you use genuine vanilla. Yes, sir; I said caramel is a standard coloring matter.

You ask if I remember the kind of receptacles in which "Coca-Cola" syrup was put up in 1886 and 1887; I thought you said I didn't have anything to do with it in 1886, didn't you? The first time I ever saw "Coca-Cola" it was in a tin can. That must have been in 1887, I believe. Then, later on, it was put up in kegs and barrels painted red,—the same color as "Coca-Cola" barrels and kegs are painted now, as near as we could get it. No, it was not when the Pemberton Chemical Company was making it. You didn't ask me that; you asked me what it was in 1887 and I told you what I put it up in afterwards. I don't remember whether that was in 1887 or not. When I put it up I put it in red kegs. I expect it was the same way if you want me to "expect" about it. I thought you didn't care for me to "expect." After I began to make this "Coca-Cola" I have no recollection from whom I bought my fluid extract of coca—I didn't buy it from anybody, I made it myself. I made it from coca-leaves, of course—I can say positively, you know. I can't remember who it was made it for me, it was someone—I made most of it myself. Yes, sir, I remember the process by which I made it.

"XQ. 97. Explain that process, if you will."

(Mr. HIRSCH.—"I object to that because it is incompetent, irrelevant and immaterial and, as counsel for the Coca-Cola Company, I advise the witness [372] not to answer that question.")

(Deposition of Asa G. Candler.)

"I am not asking the process of 'Coca-Cola,' but the fluid extract of coca."

"A. I don't think that is necessary."

(Mr. HIRSCH.—"I object to that further on the ground that it is a trade secret and, as counsel for the Coca-Cola Company, advise the witness not to answer the question.")

Our process of making the fluid extract of coca was a secret process, it was to us, the manner in which it was made. No, I don't know the manner in which other concerns make fluid extract of coca. It is in the books, you can get the U. S. Dispensatory, it will tell you. No, sir, I didn't make it that way. This fluid extract of coca that I refer to was derived from coca leaves,—erythroxylon coca. I don't know that I bought the coca leaves; I don't know whether I can answer that or not. I don't know who I bought them from at that time. I bought them on the market, of course. I could not give you the names now.

"XQ. 104. Do you know what the vital principal, or the chief alkaloid, of coca leaves is?

(Objected to by plaintiff as irrelevant and immaterial and not based on anything in the direct examination.)

"A. Oh, I am not going to answer that, if you want to know that you can get that in all the books of the country."

(Mr. LITTLETON.—"Just put this down—we except to the entire deposition of this witness, unless he is going to answer the questions propounded, and we will reserve the right to further cross-examine him

after the Court has ruled on the question whether or not he is required to answer these questions.")

Yes, sir; I was the Candler in Walker, Candler & Company. You ask whether April 14, 1888, when J. S. and C. M. Pemberton made this transfer to Walker, Candler & Company, was the first time I ever owned any interest in "Coca-Cola"; I don't remember exactly what the connection, whether I owned it or not; I believe it was, I can't say positively, it looks like it, that's the record. I don't think J. S. [373] and C. M. Pemberton were running either the Pemberton Chemical Company or the Pemberton Medicine Company on April 14, 1888—what was Lowndes and that crowd doing at that time? My recollection is that after April 14, 1888, J. S. and C. M. Pemberton were interested in the Pemberton Medicine Company. C. M. Pemberton was Dr. Pemberton's wife. Physically, I don't think she had anything to do with it. Cliford Pemberton, I think, is her name. After this transfer, April 14, 1888, to Walker, Candler & Company, they, in connection with others, operated the Pemberton Medicine Company—that's it, yes sir. That Company's business was manufacturing "Wine Coca," and they undertook to manufacture,—it was a hair dye, and they had "Globe Flower Cough Sprup" and "Compound Stillinga," and shortly after I bought "Coca-Cola" they started out manufacturing a soda-fountain drink which was as near like "Coca-Cola," in color, as they could get it—that is, a man named Mayfield that was connected with that company—he called it

(Deposition of Asa G. Candler.)

"Yum Yum." I don't recollect that I ever tasted it. I am not certain whether that was manufactured by the Pemberton Medicine Company or by J. C. Mayfield—he seemed to be the active man in it; Dr. Pemberton was a sick man at that time. I don't know anything about who else was in it. I think Mr. Bloodworth was in it, since you mention it, and Mr. Murphy. Yes, that's right, they were connected with the Pemberton Medicine Company. I never heard of any cola beverage which they manufactured except "Yum Yum." They tried to make it as similar to "Coca-Cola" as they could. I never heard of their manufacturing a drink called cocoa. The first year of Walker, Candler & Company's ownership of "Coca-Cola," from 1888 on, the business was very light. No, it was not altogether local. It was in the State, I think probably some business was done in Nashville; Walker was traveling all over the country trying to sell it. And these people, Mayfield, Bloodworth and Murphy were running the Pemberton Medicine Company, for a while—I don't think they ran it long—and they were manufacturing a drink similar to "Coca-Cola" at that time, but I don't think they manufactured it long,—if they did they didn't do much with it. **[374]** I know they quit entirely not long afterwards. Mr. Mayfield asked favors of me—he stored all his stuff in my place, kept it there for a long time. Oh, yes, there is a drink called "Afri-Cola." I have heard of it frequently. Yes, sir, I think I have seen it—I know I have. It's about as near the color of "Coca-Cola" as they could get it. It is sold in barrels whenever they can—sometimes

(Deposition of Asa G. Candler.)

go far enough to say it's the same thing—there ain't many folks they can fool long. Yes, sir, there is a "Ko-Nut,"—that's run by the same gang, I think—they did not succeed very well. Yes, sir; I think that is sold in red barrels, too,—the only way I know, I see red barrels traveling around town, red barrels and no labels, and they tell me it's "Afri-Cola." I don't believe I ever heard of "Ala-Cola." I understand that Hagan & Dodd make "Afri-Cola" and "Ko-Nut." I don't know, but I think they have been making it ten or twelve years. I don't know whether they are doing anything with the "Afri-Cola," I don't see it much—I don't know about the "Afri-Cola." I never saw it in my life; what I saw traveling around through this town didn't even have a label on the barrel. I pass it every day, and I never saw a barrel coming out of Hagan & Dodd's place with a label on in my life. Oh, yes, I knew Mayfield in 1888. When he went out of business, or, rather, quit it, he came up and as a kindness to him I took his stuff, which stayed in my place for a long time, I don't know how long—that was his remnants, his bottles and so on. I never knew what became of Mr. Bloodworth and Mr. Murphy. They lived at Barnsville, did they not? I never knew of them except as a corporation. (Mr. HIRSCH.—"Mr Candler, you can answer that question he asked you a while ago—go ahead and tell him what is the leading alkoloid contained in the coca leaf.")

ANSWER. "Cocaine, that is the leading alkaloid."